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Title: National Railroad Passenger Corporation, Appellant
v.
Atchison, Topeka and Santa Fe Railway Company, et al.

Docketed:
March 9, 1984

Court: United States Court of Appeals
for the Seventh Circuit

Vide:
83-1633

Counsel for appellant: Mickey Jr., Paul F.

Counsel for appellee: Platt, George A., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 9 1984	G	Statement as to jurisdiction filed.
3	Mar 22 1984		Order extending time to file response to jurisdictional statement until May 25, 1934.
4	Mar 29 1984		Memorandum of appellee United States filed.
5	May 17 1984		Motion of appellees AT&SF Rwy. Co., et al. to dismiss or affirm filed.
6	May 25 1984	X	Reply brief of appellant Natl. RR Passenger Corp. filed.
7	May 29 1984		DISTRIBUTED. June 14, 1984
9	Jul 18 1984		REDISTRIBUTED. September 24, 1984
11	Oct 1 1984		In No. 83-1492 probable jurisdiction is noted. In No. 83-1633 further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.
			**********
12	Nov 15 1984		Brief of appellant Natl. RR Passenger Corp. filed.
13	Nov 15 1984		Joint appendix filed. VIDED.
14	Nov 15 1984	X	Brief of appellee United States in No.83-1633 in support of appellant filed.
15	Dec 4 1984		SET FOR ARGUMENT. Tuesday, January 15, 1985. This case is consolidated with No. 83-1633. (4th case) (1 hr).
16	Nov 30 1984	G	Motion of the Solicitor General for divided argument filed.
17	Dec 10 1984		Motion of the Solicitor General for divided argument GRANTED.
18	Dec 10 1984		CIRCULATED.
19	Dec 11 1984		Record filed.
20	Dec 11 1984		Certified original record on appeal and C.A. proceedings received.
21	Dec 15 1984	X	Brief of appellees AT&SF Rwy. Co., et al. filed. VIDED.
22	Jan 2 1985	X	Reply brief of appellant Natl. RR Passenger Corp. filed. VIDED.
23	Jan 15 1985		ARGUED.

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JURISDICTIONAL

STATEMENT

Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

83 No. 1492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL RAILROAD PASSENGER CORPORATION,
Appellant,

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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JURISDICTIONAL STATEMENT

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
NATIONAL RAILROAD
PASSENGER CORPORATION
400 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

69 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in holding unenforceable an Act of Congress requiring the Railroads to reimburse Amtrak for rail travel privileges accorded to the Railroads' employees and former employees, on the ground that requiring reimbursement in excess of the incremental cost to Amtrak of providing the privileges would impair the Railroads' contract rights?

PARTIES

In addition to the parties identified in the caption above, the United States participated in this case as an Intervenor-Defendant in the District Court and as an Intervenor-Appellee in the Court of Appeals. The United States has filed a Notice of Appeal in the Court of Appeals, printed in the Appendix at p. 33a, and has been granted an extension of time until May 11, 1984, in order to determine whether it will file a Jurisdictional Statement. Order issued on March 2, 1984, in No. A-697.*

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* Amtrak is a mixed-ownership corporation chartered under the laws of the District of Columbia in accordance with section 301 of the Rail Passenger Service Act, 45 U.S.C. § 541. Amtrak is not a subsidiary of any other corporation. Amtrak owns 50% of the capital stock of the Chicago Union Station Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

NATIONAL RAILROAD PASSENGER CORPORATION,
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v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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JURISDICTIONAL STATEMENT

Appellant National Railroad Passenger Corporation ("Amtrak") appeals from the final judgment of the United States Court of Appeals for the Seventh Circuit, dated December 13, 1983, holding unenforceable a provision of the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.*, requiring Appellee railroads ("the Railroads") to pay Amtrak a stated level of reimbursement for rail travel privileges accorded the Railroads' employees and former employees.

OPINIONS BELOW

This case was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, and was designated No. 80-C-6749. The Court's Memorandum Opinion and Order, issued on November 22, 1982, by the Honorable Bernard M. Decker, is unreported. It is reprinted in the Appendix to this Statement at p. 11a.

The decision of the United States Court of Appeals for the Seventh Circuit, issued on December 13, 1983, is reported as *Atchison, Topeka, and Santa Fe Railway v. National Railroad Passenger Corp.*, 723 F.2d 1298 (7th Cir. 1983), and is reprinted in the Appendix at p. 1a.

The Report of the General Accounting Office entitled "How Much Should Amtrak Be Reimbursed For Railroad Employees Using Passes To Ride Its Trains?" (B-196907, CED-80-83), issued on March 28, 1980 ("GAO Report"), is unreported. The Report was designated R.36, Exh. 3 in the record before the Court of Appeals.

The Report of the Interstate Commerce Commission entitled "Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act, As Amended," issued on December 20, 1972 ("ICC Report"), is reported at 347 I.C.C. 325 (1972).

BASIS FOR JURISDICTION

On December 13, 1983, a panel of the U.S. Court of Appeals for the Seventh Circuit issued a decision declaring that enforcement of the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, would impair the Railroads' contractual rights in a constitutionally impermissible manner. Amtrak filed a Notice of Appeal in the Court of Appeals on January 10, 1984. The United States filed a separate Notice of Appeal on January 12, 1984.

Jurisdiction of the U.S. Supreme Court to entertain this appeal lies under 28 U.S.C. § 1252. That provision

authorizes direct appeals to the Supreme Court from any final order of any United States court holding an Act of Congress unconstitutional in any civil action to which the United States is a party. In this case the Court of Appeals declined to declare expressly that Pub. L. No. 96-73 was invalid; instead, the court stated that the statute "unreasonably and illegally impairs the rights of the railroads . . . and may not be enforced." 723 F.2d at 1303. Decisions of this Court make clear that appellate jurisdiction under 28 U.S.C. § 1252 embraces not only cases where a federal statute is expressly declared unconstitutional on its face, but also cases where a federal statute is held unenforceable on the ground that enforcement would be unconstitutional. *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1382); *see also United States v. Clark*, 445 U.S. 23, 25 n.2 (1980). Moreover, although the Court of Appeals attempted to avoid a declaration of invalidity, the statutory provision it ruled unenforceable is written in mandatory terms—Amtrak "shall be reimbursed by each railroad" at the challenged rate—and thus declaring it unenforceable is tantamount to declaring it void.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a. Constitetional Provisions

Article One, Section Eight, United States Constitution:

> The Congress shall have Power . . . .
>
> [3] To regulate Commerce . . . among the several States . . . .

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

b. Statutory Provisions

The statute at issue in this case is the Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1328, 45 U.S.C. § 501 *et seq.* (1976), as amended, and in particular sec-

tions 301, 401, and 405(f) of that statute, 45 U.S.C. §§ 541, 561, 565(f), as amended by Pub. L. No. 92-316, 86 Stat. 227, and by the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, 93 Stat. 537. These provisions are set out in the Appendix at pp. 40a-45a.

STATEMENT OF THE CASE

In 1970, Congress enacted the Rail Passenger Service Act ("the RPSA") to authorize the creation of Amtrak as a for-profit corporation responsible for providing intercity rail passenger service throughout the United States beginning May 1, 1971. Under section 401 of the RPSA,[1] railroads operating intercity passenger trains were offered relief from their common carrier obligation to carry passengers as of May 1, 1971, if they were able to satisfy two preconditions. First, they had to agree with Amtrak upon the terms of a contract ("Basic Agreement") establishing their obligations to support Amtrak's operation of passenger service over their rail lines and using their personnel and facilities. Second, they had to pay Amtrak an amount equal to "50 per centum of the fully distributed passenger service deficit of the railroad as reported to the [Interstate Commerce] Commission for the year ending December 31, 1969."[2] Appellee Railroads all signed Basic Agreements, made the required start-up payments, and surrendered their passenger obligations to Amtrak on May 1, 1971.

When the railroads operated passenger service for their own accounts prior to 1971, they established a practice of granting free and reduced-rate transportation privileges to employees, retirees, and their dependents. When Amtrak came into being it decided to curtail existing rail pass privileges. Although the Basic Agreement expressly authorized Amtrak to determine what transportation privileges, "if any," would be provided, Amtrak's decision to curtail pass travel sparked a controversy with the railroads, who warned that significant problems of morale and labor unrest would ensue. Amtrak's Board of Directors was persuaded to expand its pass policy somewhat, but even the expanded policy did not provide all the pass privileges that had existed prior to Amtrak's creation. The railroads continued to be concerned about the loss of pass privileges for their employees, and they persisted in attempting to persuade Amtrak to restore those privileges.[3]

In 1972, Congress examined the matter, and over Amtrak's vigorous opposition,[4] it amended the RPSA to require Amtrak to restore free or reduced-rate transportation to all railroad employees who had these privileges when Amtrak took over rail passenger service. Pub. L. No. 92-316 ("the 1972 amendment"). The 1972 amendment required Amtrak to assure that to the maximum extent practicable, any railroad and terminal company employees, retirees, and their dependents who were eligible for free or reduced-rate transportation on April 30, 1971, would be able to travel free or at a reduced rate on any intercity rail passenger service provided by Amtrak, on terms similar to those available to them on that date. 45 U.S.C. § 565(f). In the words of the Senate Committee which reported on the legislation, "Congress [was] merely continuing pass policies which the railroads themselves developed."[5]

The 1972 amendment provided that railroads were to reimburse Amtrak for costs incurred in providing the required free and reduced-rate travel, including the cost of implementing and administering the program. Amtrak

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[1] 45 U.S.C. § 561.

[2] 45 U.S.C. § 561(a)(2).

[3] These facts are set out at Court of Appeals Record R.36, Lewis Affidavit, paras. 4-5, 7-8; R.36, exhs. 5, 6, 8, 9.

[4] *See, e.g.*, S. Rep. No. 756, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2393, 2414-16, 2420-22.

[5] *Id.*, [1972] U.S. Code Cong. & Ad. News 2393, 2400. *See* H.R. Rep. No. 905, 92d Cong., 2d Sess. 11 (1972); Cong. Rec. S6879-80 (daily ed. April 27, 1972).

and the railroads could not reach agreement on the amount of these costs—Amtrak sought fully allocated costs, while the railroads offered only incremental costs—and the matter was promptly referred to the Interstate Commerce Commission ("ICC"). The ICC approved an interim reimbursement rate of $.00079 per passenger mile, a rate which in its view represented the "minimal variable costs" Amtrak would incur in transporting pass riders.[6] The ICC also decided that this compensation should be offset by any reduced-rate fares paid by pass riders. As a result of this offset, the railroads reimbursed Amtrak solely for the pass program's administrative costs.

In 1979 Congress reexamined the issue of compensation and amended section 405(f) of the RPSA to require railroads to compensate Amtrak "at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile"[7]—essentially a quarter of the average ticket price for a mile of rail travel. The 1979 amendment made this rate effective on an interim basis for a two-year period ending on September 30, 1981, and directed the General Accounting Office ("GAO") to conduct a study and report back to Congress and the ICC within 180 days with recommendations for appropriate reimbursement to Amtrak, "taking into account the value of the services being provided."[8] GAO undertook an exhaustive study of the subject and concluded in its report that it could not determine with any precision either the actual costs to Amtrak of the railroad employee pass system or the value to the Railroads and their employees of the travel privileges they received. Moreover, GAO stated that it could not find any reason to prefer either the actual-cost basis or the value-received basis of reimbursement. In conclusion, GAO stated that "whether Amtrak should be reimbursed for the value of the service it provides pass riders or for the incremental cost of providing the service . . . is a policy decision that the Congress should make."[9] Congress made its policy choice in 1981 when it retained the 25% standard and made the compensation requirement permanent. Amtrak Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 687.

[6] ICC Report, 347 I.C.C. at 334.

[7] Section 120(a), Pub. L. No. 96-73 ("the 1979 amendment").

[8] Section 120(b), Pub. L. No. 96-73.

In December 1980, Appellee Railroads filed this suit against Amtrak alleging that Congress had violated their constitutional right to due process when it amended section 405(f) of the RPSA to require them to compensate Amtrak for the pass travel of their employees and former employees. They filed a Motion for Summary Judgment asserting this constitutional claim, and in response Amtrak filed a Cross-Motion for Summary Judgment. The United States intervened under 28 U.S.C. § 2403 and filed a Motion to Dismiss, or, in the alternative, for Summary Judgment.

On November 22, 1982, the Honorable Bernard M. Decker issued an Order and accompanying Memorandum Opinion granting the Motions of Amtrak and the United States. In essence, Judge Decker held that the Railroads had no true contract right to be free of all financial responsibility for their employees' pass privileges. He also ruled that under the "harshest possible scrutiny" to which congressional regulation of commerce could be subjected, the pass rider provision did not violate due process. Finally, he ruled that Congress had acted rationally in determining the amount of pass rider compensation to Amtrak, and that the statutory standard was constitutional as a matter of law.

The Railroads appealed this decision to the United States Court of Appeals for the Seventh Circuit, again alleging that the reimbursement requirement impaired their contract rights and was thus unconstitutional. On December 13, 1983, a panel of that court reversed the District Court's decision in part and affirmed it in part. The

[9] GAO Report at 30.

Court of Appeals agreed with Judge Decker that the Basic Agreement did not give the Railroads a contractual right to be free of all responsibility to reimburse Amtrak for employee pass privileges. However, the court held that the methodology for computing reimbursement set forth in the 1979 amendment required the Railroads to pay amounts in excess of the incremental cost of employee pass privileges, and it reasoned that since these additional sums presumably went to support Amtrak's general operations, the statute impaired the Railroads' contractual right to be relieved of all responsibility for the provision of intercity rail passenger service. Amtrak now appeals from that decision.

THE QUESTION IS SUBSTANTIAL

This case is of considerable importance simply by virtue of the fact that a court has struck down an Act of Congress. In addition, when viewed from any of three perspectives, the issues raised in this appeal are clearly so substantial as to warrant full briefing and oral argument.

a. The Court Of Appeals Has Imposed An Economic Limitation On Congress' Authority That Is Unreasonable And Without Support In The Constitution.

Properly understood, this case does not involve any issues of contract impairment. Even assuming the United States was somehow contractually bound not to impose any burdens associated with passenger service on the Railroads—an assumption Amtrak and the United States have strenuously disputed [10]—the fact is that the amounts Congress has required the Railroads to pay are compensation for the provision of a service to the Railroads' employees. The Court of Appeals' finding that the compen-

[10] In section 301 of the RPSA, 45 U.S.C. § 541, Congress stated that "[t]he right to repeal, alter, or amend [the statute] at any time is expressly reserved," thus demonstrating that it never contemplated being bound not to exercise its regulatory authority over the railroads.

sation constitutes a prohibited subsidy of passenger service is based on its determination that the compensation is excessive.[11] And that determination rests on the court's view that the Railroads may not lawfully be charged more for their employees' pass privileges than the incremental cost Amtrak actually incurs in transporting the passholders.

This proposition—that Congress may charge no more for services than the incremental costs of providing them—implies previously unknown limits on Congress' power and is ominous in its implications. The Constitution cannot fairly be read to impose such a rigid economic constraint. Given that Congress has the power to enact reasonable regulations of commerce, including the requirement that services be provided, it surely has a wider range of options in fixing compensation for those services than the Court of Appeals has found. For example, there is no reason in law or logic why reimbursement based on the fair value of services should not pass constitutional muster.

Moreover, the process the Court of Appeals has followed is as troublesome as its conclusion. The principle is well-established that courts are not free to second-guess the congressional policy choices that underlie economic and social legislation. Decisions concerning the proper allocation of the burdens and benefits of economic life are the province of the legislature, and absent proof of arbitrariness or irrationality these decisions should not be re-

[11] 723 F.2d at 1302. The Court of Appeals declared that the reimbursement Amtrak receives under the statute is "in excess of what the railroads would have expended had they provided the pass privileges." 723 F.2d at 1303. This conclusion has no foundation in the record before the court. To the contrary, it is clear that in the absence of congressional intervention, the Railroads had only two ways of continuing to provide pass privileges themselves: they could have continued to conduct passenger operations, and thus continued to incur the disastrous losses associated with those operations; or they could have offered Amtrak sufficient compensation to persuade Amtrak to provide the privileges voluntarily.

examined by the judiciary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976); *Kleppe v. New Mexico*, 426 U.S. 529, 541 n.10 (1976).

The Court of Appeals violated this rule in particularly stark fashion. Congress, assisted by the GAO, deliberated between reimbursement based on incremental cost to Amtrak and reimbursement based on value to the Railroads and the pass riders, and it made a clear policy choice in favor of the latter alternative. The Court of Appeals expressed its disagreement with the economic value Congress attached to pass ridership by effectively striking down the enactment. The decision badly misconceives the proper role of courts in reviewing federal legislation regulating commerce.

b. The Reimbursement Requirement Is Plainly Constitutional By Any Reasonable Measure Of Due Process.

The reimbursement requirement of the 1979 amendment is so plainly justifiable that it should be found constitutional not only under the established means-ends test of rationality, but also under alternative and more rigorous standards of review which in the Railroads' view apply to this case.

This Court has consistently held that when Congress regulates interstate commerce, the requirements of the Due Process Clause are satisfied if it appears that Congress has chosen a reasonable means to accomplish a legitimate end. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964); *Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 558 (1937). In *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981), the Court stated that "[a] court may invalidate legislation enacted under the Commerce Clause only if it is clear . . . that there is no reasonable connection between the regulatory means selected and the asserted ends."

The Court of Appeals should have applied this means-ends test to the reimbursement requirement. Again, this

case does not involve any genuine issues of contract impairment. Instead, it involves Congress' latitude in fixing fees for services required to be provided under federal legislation—plainly a subject that should be reviewed under traditional due process analysis. Had the Court of Appeals applied the means-ends test, it could only have agreed with the District Court that Congress acted reasonably in requiring the Railroads to support the continuation of pass privileges for their employees by paying Amtrak amounts based on the value of the pass privilege.[12]

Indeed, even if this case did involve the impairment of contract rights or the destruction of property interests, as the Railroads have urged, and even if a more exacting standard of review were applicable, a careful review of Congress' action would nevertheless have led the court to sustain the reimbursement requirement of the 1979 amendment. One alternative approach urged by the Railroads below was to construe the Due Process Clause of the Fifth Amendment to impose on Congress the same restrictions imposed on states by the Contract Clause. Another approach they advanced was to enquire whether the reimbursement requirement effects a taking of the Railroads' property without just compensation.[13] The Contract

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[12] In fact, the Court of Appeals stated that it had "no doubt that the 1979 amendment may be sustained as a legitimate exercise of the commerce power." 723 F.2d at 1302-03.

[13] In their Reply Memorandum filed with the District Court, the Railroads asserted that they "undoubtedly *could* have sued the United States, alleging . . . a taking of their property," but stressed that "they [had] not done so" and stated that it was "simply inaccurate to force this case into the mold of an eminent domain proceeding." Plaintiffs' Reply Memorandum in Support of their Motion for Summary Judgment at 12 (emphasis in original) (Court of Appeals Record R.50). Presumably the Railroads chose not to pursue a takings theory out of recognition that the availability of a Tucker Act remedy would bar any declaration that the statute was unconstitutional or any effort to enjoin its enforcement. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40; *Blanchette v. Continental Gen. Ins. Corps.*, 419 U.S. 102, 126 (1974). At most, a takings claim would have entitled the

Clause standard, set forth most recently in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-50 (1978), and the takings standard, explained in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), both employ *ad hoc* balancing tests that go beyond the simple enquiry whether Congress has acted rationally. These tests lead courts to enquire about matters such as the importance of the legislative objective; the degree of harm caused to private contractual or property interests; the extent of interference with investment-backed expectations; and the scope of application of the statute.

Facts placed squarely before the Court of Appeals show that the reimbursement requirement is clearly valid when assessed along these lines. The Railroads suffer no substantial harm as a result of enactment and amendment of the statute: they are required to pay a fair price for an employee benefit for which they pressed Amtrak very hard,[14] a benefit which they insisted was essential to preserve employee morale and labor tranquility.[15] Moreover,

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Railroads to present evidence to the U.S. Claims Court to show *inter alia* the extent to which the statute had made them worse off—a difficult showing for them to make.

[14] The Court of Appeals was plainly mistaken when it implied that Amtrak had furnished no additional consideration to the Railroads that would justify the alleged modification of the Basic Agreement. 723 F.2d at 1302. Neither the original RPSA nor the Basic Agreement gave the Railroads any right to have their employees' pass privileges preserved. In 1972, following and wholly apart from the creation of any contract rights, Congress required Amtrak to provide a service that was of direct benefit to the Railroads. Seven years later, Congress required the Railroads to provide meaningful compensation to Amtrak. Thus if the alleged contract was affected, it was adjusted on both sides of the equation. *Cf.* District Court Opinion, Appendix at 19a.

[15] *See* Court of Appeals Record cited at note 3 *supra*; *see also Baker v. System Federation No. 1*, 331 F. Supp. 1363 (E.D. Pa. 1971) (dissolving temporary restraining order previously entered against Amtrak to prevent threatened strike over curtailment of pass privileges, on ground that Amtrak had no statutory obligation to provide such privileges).

the Railroads continue to receive virtually all the benefits of their supposed bargain to be rid of their enormous passenger service losses, and they have not suffered interference with any investment-backed expectations. Congress' goals—preserving labor peace by requiring the continuation of valued employee benefits, and preserving pass travel by imposing a portion of its full costs on the Railroad beneficiaries—can fairly be regarded as important legislative purposes.[16] And the legislation is drawn narrowly, to focus on a limited and quickly diminishing group of employees[17]—those with pass privileges in 1971. Congress noted that those employees were led to expect lifetime pass privileges while still in the Railroads' employ, and that the Railroads benefitted from this expectation.[18]

In light of these facts, it is clear that the reimbursement requirement should have been upheld under any appropriate standard of scrutiny. But the Court of Appeals rejected both the means-ends test of rationality and the less deferential Contract Clause and Takings Clause standards. Instead, the court employed a new and far more exacting standard of review: Congress' enactment may be sustained only if "Congress' regulation of interstate commerce in this specific statute is . . . paramount to the [contractual] rights of the railroads . . . ." 723 F.2d at 1303.

Even if the Railroads did have contract rights, and even if those rights had somehow been adversely affected,

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[16] In upholding the power of Congress to require railroads to make payments for labor protection, even where those payments are not clearly in the Railroads' interest, this Court has found that protecting the orderly and efficient operation of the national railroad system by maintaining good labor relations and employee morale is in the public interest. *United States v. Lowden*, 308 U.S. 225, 233-36 (1939).

[17] GAO's 1980 study revealed that there were 2.83 million eligible employees in 1972, and only 1.05 million in 1979. GAO Report at 9.

[18] Cong. Rec. S6879-80 (daily ed. April 27, 1972).

this novel balancing test would be inappropriate. The test puts Congress' authority to regulate interstate commerce, which this Court has described as "plenary" and without limitations save those prescribed in the Constitution, on a par with the interests of private parties under public or even private contractual arrangements. By requiring a showing that Congress' interests are paramount to those of the Railroads, the Court of Appeals' decision effectively narrows the scope of Congress' authority under the Commerce Clause. In addition, the court's standard of review places upon Amtrak and the United States the burden of establishing that Congress has acted in a constitutionally permissible manner.[19] One of the most familiar axioms of this Court's jurisprudence is that the party challenging the constitutionality of a statute bears the burden of demonstrating its invalidity. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Allowing this erroneous ruling to stand may invite baseless attacks on other portions of the RPSA or on other federal statutes as well.

c. The Court Of Appeals' Ruling Seriously Limits Congress' Ability To Make Needed Improvements To Amtrak's Statutory Scheme.

When Congress enacted the RPSA, it embarked upon an experiment. From among several possible solutions to the serious problem of a deteriorating intercity rail passenger system, it chose to create a new corporate entity to assume the freight railroads' obligations as common carriers of passenger traffic. Recognizing that Amtrak would always be heavily dependent upon assistance from the private railroad industry, Congress required the railroads to give Amtrak binding commitments of various sorts of assistance before it would release them from their statutory responsibilities. And recognizing that changes in the

[19] The court stated that it was "Amtrak's burden to establish that, under the circumstances of this case, Congress' regulation of interstate commerce in this specific statute is, by virtue of the evidence before it or the courts, paramount to the rights of the railroads under the basic agreement." 723 F.2d at 1303.

legislative scheme might well be necessary, Congress declared expressly in section 301 of the RPSA that it was reserving the right to repeal, alter or amend the statute which created Amtrak and extricated the private railroads from their disastrous passenger business. Congress has altered the RPSA many times, and has added to the Railroads' obligations in several respects.

The Seventh Circuit's decision poses a significant threat to the success of the Amtrak experiment. The decision strongly implies that Amtrak's original agreement with the railroad industry, and possibly the RPSA as well, bind Congress not to impose upon the railroads any obligations—even obligations with respect to employees in freight service—that have the incidental effect of contributing to Amtrak's efforts to operate passenger service. Congress plainly did not intend this result when it released the railroads from their passenger obligations. If the decision stands, the Court of Appeals will have effectively tied the hands of Congress in dealing with the future of rail transportation.

CONCLUSION

The Court of Appeals' implicit determination that Congress may not lawfully charge more for services than the incremental cost of providing them is without foundation. Congress would be seriously hamstrung if it were held to so rigid a standard in adopting measures to address economic and social problems. To correct this error, and other flaws in the court's decision, the Supreme Court should schedule this case for full briefing and argument.

Respectfully submitted,

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
NATIONAL RAILROAD
PASSENGER CORPORATION
400 N. Capitol Street, N.W.
Washington, D.C. 20001

*Counsel of Record

APPENDIX

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-3057

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Plaintiffs-Appellants,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 80 C 6749—Bernard M. Decker, *Judge*

ARGUED SEPTEMBER 12, 1983

DECIDED DECEMBER 13, 1983

Before PELL, *Circuit Judge*, COFFEY, *Circuit Judge*, and NEAHER, *Senior District Judge.**

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* The Honorable Edward R. Neaher, Senior District Judge for the Eastern District of New York, is sitting by designation.

NEAHER, *Senior District Judge.* Plaintiffs, Atchison, Topeka, and Santa Fe Railway Company, Burlington Northern Inc., Chesapeake & Ohio Railway Company, Baltimore and Ohio Railroad Company, and the Union Pacific Railroad Company (railroads), appeal the District Court's entry of summary judgment in favor of defendant National Railroad Passenger Corporation (Amtrak). Because the suit challenged the constitutionality of a statute, the United States intervened below and submitted a brief on appeal. We affirm the District Court's judgment in part and reverse it in part.

I.

In 1971, when Congress created Amtrak (the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.*), it did not explicitly decide who should pay for the time-honored custom (dating back to the 1880's) of providing railroad employees with free passes. That deficiency and its subsequent definitive solution have generated this controversy.

Pursuant to 45 U.S.C. § 561,[1] Amtrak negotiated a "Basic Agreement" with each plaintiff containing the following relevant language:

> "Section 2.1 Relief from Responsibility
>
> "From and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service.
>
> • • • •
>
> "Section 7.5 Transportation Privileges
>
> "Transportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak]."

[1] § 561(a) provides in relevant part:

> "(1) On or before May 1, 1971, the Corporation [Amtrak] is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service."

When Amtrak assumed the railroads' intercity passenger operations, it initially decided to reduce employee pass privileges. An ongoing dispute arose, and Congress eventually settled the issue with Public Law 92-316, 45 U.S.C. § 565(f), which expressly restored employees' pass privileges on terms similar to those available on April 30, 1971. The statute also required the railroads to reimburse Amtrak for costs incurred in furnishing the passes.

After hearing evidence, the Interstate Commerce Commission set the rate of reimbursement at .00079 cents per passenger mile. The I.C.C. also found that these costs should be offset by the sums collected from employees paying half fare. As it turned out, the revenues from the half fares exceeded the variable costs and, consequently, Amtrak collected only administrative expenses amounting to about $500,000 per year from 1972 to 1979.

In 1979 Congress enacted the Amtrak Reorganization Act, Public Law 96-73, Stat. 547, which amended section 565(f). Beginning October 1, 1979 and for two years thereafter, Amtrak was to be reimbursed "at the rate of 25 percent of system wide average monthly yield per revenue passenger mile." Amtrak billed the railroads at rates from .02067 cents to .02343 cents per passenger mile.[2] The two-year limitation upon the new method of computing costs was subsequently eliminated. Public Law 97-35, 95 Stat. 697.

II.

At the outset, the railroads present three theories by which they urge the Court to find that they possess vested contractual rights against the United States. Having established this contract, they make two contentions:

[2] Plaintiffs represent that they paid the following additional sums respectively: Santa Fe, $336,249.82; Burlington Northern, $490,344.72; Chesapeake & Ohio and Baltimore & Ohio, $76,345.34; and Union Pacific, $287,784.66. The sums represent the first ten months of operation of the 1979 amendment.

Both the original (1972) version of section 565(f) and the 1979 amendment impair those rights in a constitutionally impermissible manner.

Amtrak, which was authorized to negotiate the basic agreement and was the only defendant sued, is not an agency or establishment of the United States. 45 U.S.C. § 541. Nevertheless, we need not consider the source of the railroads' asserted rights because the terms of the basic agreement, while somewhat more specific, parallel the statute which authorized them. Thus, the railroads have no more contractual rights under the terms of the statute than they have under the terms of the basic agreement. Further, whatever the source of the railroads' rights, we conclude first, that Congress did not act unconstitutionally in requiring the railroads to reimburse Amtrak for employee pass privileges, but second, that the method chosen for reimbursement in the 1979 amendment does impermissibly impair the terms of the basic agreement. We turn first to the railroads' claim that reimbursement impairs their rights.

III.

The railroads read sections 2.1 and 7.5 (quoted above) of the basic agreement together to contend that they have been relieved of any financial responsibility for employee pass privileges. We do not agree.

The parties disagree over the meaning to be accorded the language of section 2.1 of the basic agreement.[3] As such, the Court is required to interpret a contract gov-

[3] Plaintiffs also find significance in section 7.5, which merely gives Amtrak the right to determine the extent of employee pass privileges. Its practical viability is somewhat lessened by Congress' subsequent intervention in 45 U.S.C. § 545(f), which established the extent of employee pass privileges as a matter of public policy. Section 7.5 of the basic agreement also contains no language addressing who pays for the costs of the pass privileges.

erned by the law of the District of Columbia. 45 U.S.C. § 546(d). The applicable rules in the District of Columbia are as follows:

> "'As we turn to the authorities, we may note that the theory of "objective law" of contracts has been almost universally adopted by this time. The written language embodying the terms of an agreement will govern the rights of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless there is fraud, duress or mutual mistake.'" *Minmar Buildings, Inc. v. Beltway Excavators, Inc.*, 246 A.2d 784, 786 (D.C. App. 1968) (citations omitted).

> "Whether or not a contract or its provisions is ambiguous is a question of law first to be determined by the court. A contract is not ambiguous merely because the parties to a contract later disagree on its meaning.

> "Under the law of the District of Columbia, a contract is ambiguous when it is reasonably susceptible of different constructions or interpretations, or of two or more different meanings. As the District of Columbia Court of Appeals has said:

> > '[A] contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings, and it is not ambiguous where the court can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. . . .'"

Kass v. William Norwitz Co., 509 F. Supp. 618, 623-24 (D.C. 1980) (citations omitted).

We find no ambiguity in section 2.1 of the basic agreement. In its order, the District Court correctly concluded that the provision of employee pass privileges was never a "responsibility" of the railroads in providing intercity passenger service.[4] It was a totally gratuitous undertaking which never became part of any contract or collective bargaining agreement. The creating statute specifically required a railroad to make arrangements as necessary to preserve "rights, privileges, and benefits . . . under exist-

[4] The railroads reason that pass privileges fall within the broad definition of "Intercity rail passenger service", 45 U.S.C. § 502(5), and that they have been relieved of their entire responsibility for the provision thereof; therefore, they assert they have no liability for the costs of passes.

This argument goes far beyond the context of the basic agreement and the statute. Despite the rather broad language employed in the basic agreement, as derived from 45 U.S.C. § 561, other portions of the statute and basic agreement impose obligations of a financial or potentially financial nature at least as directly related to the provision of intercity passenger rail service as employee passes, 45 U.S.C. § 562; 45 U.S.C. § 565; Basic Agreement, § 7.5, clauses 1 through 4. Consequently, the release from financial responsibility is not all encompassing and in any event, would only cover those items falling within the ambit of its language.

Additionally, the contractual language at issue, born of 45 U.S.C. § 561(a)(1), is inextricably interwoven in the statute with the decision of the Interstate Commerce Commission on the amount of the contracting railroad's "avoidable loss", defined in 45 U.S.C. § 502(6). This context compels a very narrow reading of the term "responsibility", one which confines its meaning to the obligations imposed by virtue of statutes and regulations. *See generally Seaboard Coastline R. Co. v. Nat. R.R. Pass. Corp.*, 645 F.2d 513, 516 (5th Cir. 1981).

Relying on *Penn Central Transp. Co. Discontinuance of Trains, etc.*, 334 I.C.C. 312, 331-32 (1969), and *Union Pac. R. Co. Discontinuance of Trains, etc.*, 334 I.C.C. 50, 53 n.1, the railroads argue that pass privileges were one of their responsibilities of which they were relieved; however, as is apparent from the text of the cited decisions, the I.C.C. merely considers passes as one aspect of ridership, which is in turn one factor it considers in ruling upon a carrier's request to discontinue service.

ing collective bargaining agreements or otherwise." 45 U.S.C. § 565(b). Moreover, if the railroads had ever terminated the program, their employees would have had no legal recourse.[5]

At the inception, when Amtrak proposed a reduction in pass privileges, railroad employees threatened to strike, Congress appeased them with the enactment of 45 U.S.C. § 565(f), and the railroads operated for seven years apparently content to pay the administrative costs of the pass privilege program. The railroads were motivated into litigation in December 1980 only after Congress had adopted a method of reimbursement based upon the value of the service furnished. As we explain below, this method impairs rights created by the basic agreement.

IV.

In approaching the railroads' arguments concerning the 1979 method of reimbursement, the government ignores the effect of the language of the basic agreement. The government argues that Congress chose a rational method of spreading the costs, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976), and therefore, the railroads ask this Court to reweigh the evidence and substitute its judgment for that of Congress contrary to the admonition of *Kleppe v. New Mexico*, 426 U.S. 529, 541 n.10 (1976). Congress was not legislating on a clean slate, however.

Each side posits its own motivations for Congress' action derived from the legislative history. We need not engage in speculation about motives, although it would be reasonable to conclude from the record that the financial debacle of Amtrak's first eight years contributed to

[5] The same would not be true of employees who held a collective bargaining agreement containing a pass privileges provision. *See Baker v. System Federation No. 1*, 331 F. Supp. 1363 (E.D. Pa. 1971).

the new method of cost spreading. We also need not weigh evidence nor determine the legislative power of Congress. The issue is whether Amtrak may bill the railroads at the statutorily authorized rate in light of the basic agreement and not whether the statute itself is valid.

Amtrak was created to "provide intercity passenger rail service." 45 U.S.C. § 541. Congress specifically found the need for such service and the need for federal intervention to provide it. 45 U.S.C. § 501. Congress also bestowed power and authority on Amtrak to enable it to accomplish the intended legislative end. 45 U.S.C. § 545. As a consequence, any revenue Amtrak collects, unless earmarked for a specific purpose, is available to finance intercity rail passenger service, the provision of which, under the basic agreement, is no longer the railroads' responsibility.

Although we have found that employee pass privileges were not a responsibility of the railroads, the statute at issue authorizes reimbursement beyond the costs of the passes. It thereby transfers funds from the railroads to Amtrak, which funds Amtrak may in turn use to finance aspects of its operations that were once part of the railroads' entire responsibility for the provision of intercity rail passenger service. We have no facts or evidence before us to demonstrate that the statute operates in any different manner than to attempt to take back part of what Congress authorized Amtrak to give in the basic agreement. Thus, the railroads have established the impairment of the contract, or more specifically, that the statute authorizes Amtrak to breach the basic agreement.[6]

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[6] The size of the sums exacted, note 2 supra, under the 1979 amendment, precludes any contention that it is merely a "minimal" alteration of the basic agreement. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

To avoid being in breach, Amtrak would ordinarily have to furnish additional consideration for its modification of the basic agreement, *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 445-46 (D.C. Cir. 1972); *City Stores Co. v. Ammerman*, 266 F. Supp. 766, 772 (D.C. 1967), *aff'd*, 394 F.2d 950 (D.C. Cir. 1968) (*per curiam*); however, because Congress authorized the modification, we must examine the record to determine if, under the circumstances, Congress acted pursuant to "the federal police power or some other *paramount* power." *Lynch v. United States*, 292 U.S. 571, 579 (1934) (emphasis added).[7]

Without labeling it a "paramount power", the government argues that Congress acted reasonably pursuant to its commerce power. We have no doubt that the 1979 amendment may be sustained as a legitimate exercise of the commerce power. Ending the inquiry there, however, would render any legislative enactment which impaired a contract virtually immune from judicial review, a result not intended by *Lynch*, *see* 292 U.S. at 579-80. It would also ignore Amtrak's burden to establish that, under the circumstances of this case, Congress' regulation of interstate commerce in this specific statute is, by virtue of the evidence before it or the courts, paramount to the rights of the railroads under the basic agreement. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 958-63 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

Measured by the standards of *Nachman Corp.*, 592 F.2d at 960, neither Amtrak nor the government have met this burden. They provide no rationale, beyond a claim of reasonableness, why Amtrak should realize a

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[7] The railroads urge us to use the assertedly more stringent standard of review of Contract Clause cases, *e.g.*, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 103 S.Ct. 697 (1983) (cases cited therein); however, we need not do so in order to reach our result.

windfall, an amount in excess of what the railroads would have expended had they provided the pass privileges.

Moreover, the new scheme irrationally eliminates the offset for half fares. Despite Amtrak's claim that costs are difficult to determine separately, it can easily determine the amount of half fares it collects from passholders and apply that against the amount due from a railroad.

Under the 1972 scheme the half fares paid the way of the free fares. Undoubtedly this occurred because the pass privilege is afforded on a space available basis. Thus, passholders occupy seats that would otherwise be empty. There is no evidence that Amtrak operates scheduled passenger trains contingent on the adequate sale of tickets. Therefore, Amtrak incurs certain costs, otherwise partially allocable to the pass privileges program, regardless of whether it issues any passes. Because the eligibility for passes was frozen as of April 30, 1971, those costs will increase in the future as the number of passholders decreases until there are no more passholders. The 1979 amendment makes no provision for these events. Neither Amtrak nor the government has explained the reasonableness of the 1979 amendment as a regulation of commerce in light of these facts. As a result, we conclude that the 1979 amendment to 45 U.S.C. § 565(f) unreasonably and illegally impairs the rights of the railroads under the basic agreement and may not be enforced. Accordingly, the District Court's judgment upon this issue is reversed.

Affirmed in part; reversed in part.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80-C-6749

ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*,
Plaintiffs,

—vs—

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant,

and

THE UNITED STATES OF AMERICA,
Intervenor-Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiffs Atchison, Topeka and Santa Fe Railway Company; Burlington Northern, Inc.; Chesapeake and Ohio Railway Company; Baltimore and Ohio Railroad Company; and Union Pacific Railroad Company ("the railroads") have sued the National Railroad Passenger Corporation ("Amtrak") to relieve themselves of their federal statutory obligation to reimburse Amtrak at a specified rate for free or reduced-rate rail transportation services provided by Amtrak to present and retired railroad employees and their dependents ("pass riders"). The railroads seek a declaratory judgment that the federal statutes in question, Public Law 92-316 and Public Law 96-73 (together, Section 405(f) of the Rail Passenger Service Act ("RPSA"), as amended), 45 U.S.C. § 565(f), are unconstitutional. Because the constitution-

ality of federal statutes has been called into question, the United States of America ("United States") has been permitted to intervene as a defendant. All parties have moved for summary judgment, agreeing that no questions of fact are in dispute in considering the constitutionality of the reimbursement requirement. The railroads' motion for summary judgment is partial, contending that the constitutionality of the formula for reimbursement (as distinct from the reimbursement requirement itself) does turn on a disputed issue of material fact.

The genesis of this controversy is the long-standing practice of the railroads, beginning in the nineteenth century, of providing free or reduced-rate rail transportation service to their current and former employees and their families. Such railroad passengers came to be known as "pass riders" because the employer railroads issued them passes which entitled them to the subsidized service on a space-available basis. No statute, Interstate Commerce Commission (ICC) regulations, or collective bargaining agreement obligated the railroads to provide this service; the parties agree that it was a purely voluntary undertaking.

In 1970, Congress enacted the Rail Passenger Service Act (RPSA), 45 U.S.C. § 501, *et seq.* The RPSA created a private corporation, the National Railroad Passenger Corporation, known as Amtrak, to take over the passenger rail service which the railroads had previously been required by ICC regulations to provide despite its unprofitability. Specifically, the RPSA authorized Amtrak to enter into a contract (called a "Basic Agreement") with each railroad:

> "On or before May 1, 1971, the Corporation is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail

> passenger service. . . . Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act [49 U.S.C. 1 et seq.] or any state or other law relating to the provision of intercity passenger service . . . .
>
> . . . In consideration of being relieved of this responsibility by the Corporation, the railroad shall agree to pay to the Corporation each year for three years [certain specified sums]."

45 U.S.C. § 561(a). Under the terms of the RPSA, the railroads explicitly retain certain responsibilities, among them:

(1) providing use of tracks and other facilities, 45 U.S.C. § 562,

(2) providing employees to operate and maintain the passenger trains, 45 U.S.C. § 545, and

(3) securing "protective arrangements" for railroad employees to insure that they are not adversely affected by the discontinuance of rail passenger service by the individual railroads, 45 U.S.C. § 565.

Finally, "[t]he right to repeal, alter, or amend [the RPSA] is expressly reserved." 45 U.S.C. § 541.

Pursuant to the RPSA, Amtrak did enter into a Basic Agreement with each of the plaintiff railroads. The Basic Agreement entered into with each railroad follows the RPSA guidelines. Section 2.1 of the Agreement states that, "[f]rom and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service." The question of pass riders is specifically addressed by Section 7.5 of the Basic Agreement: "Transportation privileges, if any,

with respect to business and personal travel of Railroad personnel shall be as determined by NRPC [Amtrak]."

On May 1, 1971, the RPSA and the Basic Agreements entered into thereunder went into effect, and Amtrak took over all passenger rail service from the railroads. Amtrak significantly reduced the pass ridership program from what the railroads had provided; passes were issued only to employees of those railroads which operated trains on behalf of Amtrak, and there were no free passes, only half-fare passes. In 1972, Congress decided to restore the pass rider program to the full scope with which it had operated under the railroads and to make the railroads pay for it. Congress amended the RPSA accordingly:

> "The Corporation [Amtrak] shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement. . . . . The Corporation shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees under any policy or agreement referred to in the first sentence of this subsection, including the costs of implementing and administering this section."

Pub. L. No. 92-316 (1972). Amtrak and the railroads failing to agree on a formula for reimbursement, the ICC, acting pursuant to the 1972 amendment, set the rate: $.00079 per passenger-mile of reduced-rate service

(Amtrak's estimated variable costs), to be offset by any reduced-rate fares paid by pass riders. In fact, the offset turned out to be complete, so the railroads ended up paying only the costs of administering the pass rider program.

In 1979, Congress amended the passrider provision, revising the formula for reimbursement. By the terms of Pub. L. No. 96-73, 45 U.S.C. § 565(f),

> "the Corporation shall be reimbursed by each railroad at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile. Reimbursement at this rate is in lieu of any charges for liability incident to travel of railroad employees eligible for free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-rate transportation."

Although as originally enacted in 1979, the 25 percent reimbursement formula was for two years only, it was made permanent by Pub. L. No. 97-35 (1981), following completion of a congressionally-ordered General Accounting Office (GAO) study of the pass rider problem. The GAO study concluded that the choice between a reimbursement formula based on incremental costs and one based, as the 25 percent formula is, on the value of the service pass riders receive "is a policy decision that the Congress should make." GAO Report to the Congress: *How Much Should Amtrak Be Reimbursed For Railroad Employees Using Passes To Ride Its Trains?*, March 28, 1980, at 36. The GAO reported that it "did not find adequate analytical evidence to recommend one position over the other." *Id.* at ii.

Unlike reimbursement under the 1972 formula, reimbursement under the 1979 formula imposed measurable financial burdens on the railroads. The plaintiff railroads (but not all railroads) have refused to pay the sums for pass rider service for which Amtrak has billed them

since October 1979. They contend that the statutes authorizing Amtrak to collect these sums from them are unconstitutional. They allege four specific constitutional infirmities:

(1) The statutes requiring them to pay for pass riders on Amtrak impair the United States' obligation under P.L. 92-316, a statutory contract between the United States and the railroads, to "relieve [the railroads] of [their] entire responsibility for the provision of intercity rail passenger service." This alleged impairment by the United States of its own contract is alleged to constitute a deprivation of property without due process of law, in violation of the Fifth Amendment.

(2) Even if P.L. 92-316 is not a contractual obligation of the United States which has been unconstitutionally impaired, the Basic Agreement, with identical relief from responsibility language, is such an obligation and has been unconstitutionally impaired.

(3) Even if there exists no contract between the United States and the railroads, the congressionally ordered transfer of wealth from the railroads to their current and past employees and their families (the pass riders) is a deprivation of property without due process of law, in violation of the Fifth Amendment.[1]

---

[1] Although plaintiffs' memoranda of law have obscured the issue, plaintiffs may also be attacking the reimbursement provision as a taking of their property for public use without just compensation, in violation of another clause of the Fifth Amendment. Because the railroads do not focus on this contention, and because, if they did they would be suing the wrong defendant (Amtrak, rather than the United States), this court need not discuss it. It is enough to point out that the plaintiffs have not alleged that compensation is unavailable through a proceeding against the United States in the Court of Claims. The Supreme Court has squarely held that, "an alleged taking is not unconstitutional unless just compensation is unavailable." *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 297 n. 40 (1981).

(4) Finally, even if Congress may constitutionally require the railroads to reimburse Amtrak for the cost of the pass rider program, the 25 percent reimbursement formula, by requiring the railroads to pay to Amtrak more than the cost of the pass rider program, deprives the railroads of property without due process of law, in violation of the Fifth Amendment.

I. *P.L. 92-316 as a Contract*

A statute is treated as a contract "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 14 (1977). The language of the statute in question here, P.L. 92-316, is clearly not that of a contract. Indeed, the term "contract" is used throughout the statute, not to characterize the statute itself, but rather to describe what Amtrak was supposed to enter into with the railroads (i.e., the Basic Agreement). The statute states plainly that "*the Corporation* is authorized to contract and, upon written request from a railroad, shall tender a contract . . . ," 45 U.S.C. § 561(a) (emphasis added), and that, "[u]*pon its entering into a valid contract* . . . , the railroad shall be relieved of all its responsibilities . . . ." *Ibid.* (emphasis added). The Congress which enacted the RPSA clearly was no stranger to the language of contract, and it chose to employ such language to describe Amtrak's authority, not to characterize its own work. No contractual right to relief from responsibility can flow from a statute which expressly makes such relief contingent on the execution of a true contract between other parties. As P.L. 92-316 is not a contract, it cannot be unconstitutionally impaired.

II. *The Basic Agreement as a Contract*

The Basic Agreement may well constitute a contract between the United States and the railroads. Although Amtrak is the nominal contracting party, the considera-

tion it gives—relieving the railroads from their responsibility to provide passenger rail service—is something that only the United States, if anyone at all,[2] can offer. However, even if it be assumed that the Basic Agreement is a contract between the United States and the railroads, the requirement that the railroads pay for pass riders does not impair any rights vested in the railroads by that contract. This is clear from the "contract" 's language—the initial focus of inquiry in any contractual dispute.

The Basic Agreement relieves the railroads from their "entire *responsibility* for the provision of Intercity Rail Passenger Service." Basic Agreement, § 2.1 (emphasis added). By the railroads' own admission, providing free or reduced-rate transportation to employees and their families was never a responsibility of theirs—it was a purely gratuitous undertaking, like providing a "Christmas turkey," to employ the plaintiffs' own analogy. The railroads' "responsibilities" arose from statute or regulation or from collective bargaining agreements. Those arising from the last were expressly preserved, 45 U.S.C. § 565, while, as discussed above, even some of the statutory or regulatory obligations (provision of tracks, employees, etc.) were not eliminated by the RPSA. *See* 45 U.S.C. §§ 545, 562. The Basic Agreement could not relieve the railroads of a responsibility they never had.

If the scope of the term, "responsibility," may be too slender a reed on which to absolve the United States of contract impairment, additional language in the Basic

[2] There is great merit to Amtrak's contention that the power of the United States under the Commerce Clause to regulate the passenger service responsibilities of the railroads is "an attribute of sovereignty which may not be bartered away." *Lynch v. United States*, 292 U.S. 571, 582 (1934). However, as the court finds, at least as to pass riders, that the power has not been bartered away, it need not reach the hypothetical question of whether it would be constitutional for the United States to engage in such barter.

Agreement underscores the point that this "contract" never protected the railroads against being forced to assume the cost of pass riders. As noted above, the Basic Agreement is not silent on the question of pass riders. Rather, it states explicitly that "[t]ransportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be *as determined by NRPC*." Basic Agreement, § 7.5 (emphasis supplied). Perhaps Amtrak has a claim that the statutory requirement that passes be issued impairs its rights under this Agreement by invading its discretion, but the railroads have no claim. It may be, as the plaintiffs argue, that this provision is not sufficient, standing alone, to authorize Amtrak to demand reimbursement from them, but it is not Amtrak that rests its rights on the "contract." It is the railroads who claim that the Basic Agreement guarantees their right to be free of the duty to pay for pass riders, when even the most cursory examination of the language of the Agreement reveals that it makes no such provision. Thus, the statutory provisions requiring the railroads to reimburse Amtrak for the cost of pass riders are not unconstitutional impairments of contract for they do not impair any true contractual rights.

III. *The Due Process Challenge to the Reimbursement Requirement*

The plaintiff railroads concede that the power to order them to pay for pass riders on Amtrak is within the power of the United States to "regulate Commerce . . . among the several States . . ." U.S. Const. Art. I, § 8, cl. 3. However, they insist correctly that even an exercise of Commerce Clause power will not be upheld if it "contravenes affirmative constitutional limitations on congressional exercise" of that power. *Hodel*, 452 U.S. at 283. The railroads contend that their right not to be deprived of their property without due process of law, as secured by the Fifth Amendment, is violated by, in effect, forcibly

transferring their wealth to their employees through compulsory reimbursements to Amtrak for pass riders. They take particular exception to the reimbursement requirement as it applies to former employees of the railroad, already retired as of the date of the reimbursement statute's enactment. It is said that this is the kind of retroactive increase in worker benefits held unconstitutional by the Supreme Court in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935). Certainly the Supreme Court has recognized that, "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

The railroads' concession that Congress acted within the limits of the Commerce Clause in requiring them to reimburse Amtrak for pass riders leaves them with an extremely heavy burden to overcome. The Supreme Court has squarely stated:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an *arbitrary and irrational* way."

Id. at 15 (emphasis added). In *Usery*, the Court held that the due process rights of coal mine operators were not violated by a statute requiring them to pay "black lung" benefits to former employees who had retired before the statute requiring payment of the benefits was enacted.

The railroads, in support of their contention that the pass rider reimbursement statute is "arbitrary and irrational," place principal reliance on the *Alton* case, a decision of the Supreme Court in the period (1935) before the presumption of constitutionality which they must

now overcome was firmly established. In *Alton*, the court declared unconstitutional a statute requiring employer-financed pensions for former employees who, though not employed at the time of enactment, had been so employed within the year. The railroads contend that the instant case is more like *Alton* than like *Usery*, because "the purpose of the [black lung] Act [was] to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business," *Usery*, 428 U.S. at 19, while the point of the pass rider reimbursement statute, as of the *Alton* pension statute, is "simply to increase or supplement a former employee's salary to meet his generalized need for funds." *Ibid.*

Plaintiffs have themselves distinguished *Alton* from the present action by conceding that Congress acted within its powers under the Commerce Clause in requiring them to reimburse Amtrak for pass riders. The *Alton* Court held that Congress had not only violated the rights of employers but had exceeded its commerce power in enacting the pension requirement. While the *Usery* Court also distinguished *Alton* rather than expressly overruling it, the Court's language—"Assuming that the portion of Alton invalidating this provision retains vitality, we find it distinguishable . . .," *ibid.* (emphasis added)—is hardly a ringing affirmation of its continued force. At least two lower court decisions since *Usery* have questioned whether *Alton* is still good law. *See A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1025 n. 13 (6th Cir. 1980), and *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F.Supp. 945, 955 (D.Mass. 1979), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

Alton may or may not survive. However, assuming that the instant case even poses a true question of retro-

activity,[3] this court is bound by the more recent *Usery* decision and the decision of the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980). In an exhaustive and scholarly opinion in *Nachman*, Judge Sprecher clarified *Usery*'s "arbitrary and irrational" test as applied in cases of retroactivity.

In *Nachman*, the court rejected a due process challenge to provisions of the Employee Retirement Income Security Act (ERISA) imposing pension liability on employers for former employees with exclusion of liability clauses in their pension plans even where the service of those employees had terminated before enactment of ERISA. The court restated the *Usery* "arbitrary and irrational" test, and listed the special criteria against which retroactive legislation is to be tested. In evaluating the rationality of retrospective legislation, the court said,

> "[I]t is appropriate to consider [1] the reliance interests of the parties affected, . . . [2] whether the impairment of the private interest is effected in an area previously subjected to regulatory control, . . . [3] the equities of imposing the legislative burdens, . . . and [4] the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. . . ." [All citations omitted.]

Nachman, 592 F.2d 960. Two cautionary notes must be struck before applying these factors to the instant case. First, because these criteria were enunciated in the context of legislation found, as this legislation has not been, to impair contractual obligations, the scrutiny it requires may, in fact, be more strict than the instant facts war-

[3] Retroactive legislation, as commonly understood, places new burdens on the affected parties. In this case, all that is new with the enactment of the reimbursement provision is that the retired railroad worker's pass privilege is enforceable by the United States. The actual financial burden on the railroads of providing the passe is an old, pre-statutory one.

rant. Second, even in announcing these factors, the Seventh Circuit was careful to emphasize that they were not to be "improperly . . . used to express merely judicial approval or disapproval of the balance struck by Congress, [but] only . . . to determine whether the legislation represents a rational means to a legitimate end." *Ibid.*

Applying the *Nachman* criteria, the pass rider reimbursement provision of the RPSA is plainly not arbitrary or irrational, even as applied to railroad workers who were no longer employed on the date of enactment.

On the question of reliance, the instant case is illustrative of the principle enunciated by the Supreme Court and applied in *Nachman* that, "[i]n some situations the element of reliance may cut both ways." *Nachman*, 592 F.2d at 962, quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 (1978). As is demonstrated in this court's discussion of the plaintiffs' "contract" claims, the RPSA and the Basic Agreements provide no legitimate basis on which the railroads could rely for protection from financial liability for pass riders. In contrast, the undisputed historical record of nearly one hundred years of railroads providing their present and former employees with passes offers a solid basis for employee reliance. It was the railroads who initiated the pass rider policy, they continued it uninterrupted over a long period of time, and the reimbursement provision only covers employees hired prior to May 1, 1971—i.e., employees hired by the railroads (not by Amtrak) at a time when free or reduced-rate travel was an unquestioned (if unwritten) element of railroad employee compensation.

In this case, as in *Nachman*, "Congress found that the employees' reliance interests . . . outweighed the employer's reliance." *Id.* at 961-62. In floor debate on the reimbursement provision, Senator Percy, a sponsor, ar-

gued that, "the railroads . . . must deliver on their promises of long standing," 118 Cong. Rec. 14791 (1972), while another sponsor, Senator Church, stated that, "the loss of, or reduction of free pass privileges by railroad employees entitled to them was a breach of faith with these people." *Id.* at 14792.

Federal regulation of the railroad industry, including labor relations in that industry, is simply too long-standing and comprehensive to make the second *Nachman* element—whether the impairment of the private interest is effected in an area previously subjected to regulatory control—open to dispute. The plaintiffs have not disputed it.

Applying the third *Nachman* criterion, the equities are not sufficiently in favor of the railroads as to make the congressional decision arbitrary or irrational. The *Nachman* court distinguished *Alton* on the basis that "the employer had never agreed to pay any retirement benefits," *Nachman*, 592 F.2d at 962, and both *Alton* and *Allied Structural Steel* on the basis that, in both cases, "[t]he employers received no benefit in the bargain [struck by Congress]." *Ibid.* Here, of course, the railroads had been agreeing to pay for pass privileges for their employees for almost a century. The railroads, unlike the employers in *Alton* and *Allied Structural Steel*, demonstrably benefited from enactment of the amendment restoring pass privileges to their current and former employees. The most lasting benefit, the retention of the good will of railroad workers[4]—those on wholly private freight lines as well as those serving Amtrak—is at least an intangible benefit. One benefit, however, was real and immediate. The decision in *Baker v. System*

[4] Even restoring the pass privileges of retired railroad workers can rationally be said to increase the good will of current employees toward their railroad. It would ignore human nature to contend that current workers, who know they will someday be retirees, are oblivious to the treatment of their retired colleagues.

Federation No. 1, 331 F.Supp. 1363 (E.D.Pa. 1971), indicates that railroad workers were prepared to go on strike in 1971 against private railroad companies over the failure of Amtrak to continue the pass privileges those companies had provided prior to May 1, 1971. While enactment of the 1972 amendments may not have brought lasting tranquility to railroad labor relations, elimination of a grievance intense enough to produce a strike call cannot rationally be called anything but a benefit to the parties to have been struck.

The railroads contend that the statute in question here does not include provisions designed to limit and moderate the impact of its burdens, the fourth and final *Nachman* criterion. The *Nachman* court nowhere indicated that all four factors must favor the United States in order for a retroactive statute to be upheld, only that all should be considered. Beyond that, the limitation that the court recognized in *Nachman* as dispositive was that the "provisions represent a rational attempt to limit liability only to the extent necessary to achieve the legislative purpose." *Nachman*, 592 F.2d at 962. Such is the case here. The Congress did not indiscriminately distribute pass privileges and require the railroads to bear the expense. Rather, it required the railroads to pay for pass privileges for a carefully selected, narrow class of citizens—those persons employed by or retired from the railroads, who had entered into that employment in the period ending April 30, 1971, and whose expectations of having such lifetime privileges had been engendered by the railroads themselves. This is a sufficient limitation to the burden on the railroads to preclude any finding that the congressional action imposing that burden on them was arbitrary or irrational.

Under the harshest possible scrutiny to which action taken by the Congress under its commerce power can legitimately be subjected, the 1972 RPSA amendment requiring the railroads to reimburse Amtrak for free and

reduced-rate travel passes for their current and former employees is neither arbitrary nor irrational. Accordingly, it does not deprive the plaintiffs of their property without due process of law.

IV. *The Due Process Challenge to the Reimbursement Formula*

The railroads' final contention is that, even if Congress may constitutionally compel them to reimburse Amtrak for pass riders, the reimbursement formula Congress chose in 1979—25 percent of the systemwide average monthly yield per passenger mile—deprives the railroads of their property without due process of law insofar as it makes them pay Amtrak more than the costs pass riders impose on Amtrak. The railroads deny that summary judgment is appropriate on this issue because the precise amount pass riders cost Amtrak is a disputed issue of material fact.

Summary judgment is appropriate where "the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). Such is the case here. While the amount pass riders cost Amtrak may be a disputed issue of fact, it is not material. Having determined that the Congress acted constitutionally in requiring the railroads to reimburse Amtrak for the pass rider service, this court will not second-guess the legislative branch on its selection of a particular mathematical formula for reimbursement, absent a showing that the formula was selected in an arbitrary or irrational manner. Quite to the contrary, the record here strongly supports the rationality of the process by which the Congress chose a reimbursement formula based on the value of the pass privilege to the holders rather than one based on the cost of providing the service. After enacting the value-based formula on an interim basis, the Congress ordered the GAO to study the question. As discussed above, the GAO reported that the analytical evidence did not favor one formula over

the other. GAO Report at ii. Given such a finding, this court adopts the GAO Report's principal conclusion: The choice between a cost-based formula and a value-based one "is a policy decision that the Congress should make." GAO Report at 30. With the GAO Report as background, the Congress reaffirmed its choice of the value-based formula by making it permanent in 1981.

A similar challenge to the one the railroads make to this formula was made by the coal mine operators in *Usery* to the scheme under which the Congress determined the liability of each of them for black lung benefits. The words of the Court in *Usery* are dispositive here:

> "We are unwilling to assess the wisdom of Congress' chosen scheme . . . . It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension."

Usery, 428 U.S. at 18-19.

For the reasons stated above, defendant's and intervenor-defendant's cross-motions for summary judgment are granted, and the cause is ordered dismissed.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: November 22, 1982.

Opinion by Judge Neaher

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

December 13, 1983

Before

Hon. WILBUR F. PELL, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. EDWARD R. NEAHER, Senior District Judge *

No. 82-3057

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Plaintiffs-Appellants,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Intervenor-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division
No. 80-C-6749—Bernard M. Decker, Judge

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* The Honorable Edward R. Neaher, Senior District Judge for the Eastern District of New York, is sitting by designation.

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, REVERSED in part, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 39. Costs

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(As amended April 30, 1979, effective August 1, 1979.)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-3057

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Plaintiffs-Appellants,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Intervenor-Appellee.

[Filed January 10, 1984]

NOTICE OF APPEAL

Notice is hereby given that National Railroad Passenger Corporation, defendant-appellee above named, hereby appeals to the United States Supreme Court from the Judgment entered in this action on the 13th day of December, 1983.

Date: January 9, 1984

/s/ Paul F. Mickey, Jr.
PAUL F. MICKEY, JR.
Executive Vice President
Law and Public Affairs
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967

Attorney for National Railroad Passenger Corporation

Of Counsel:
HUGH C. GRIFFIN, ESQUIRE
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-3057

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, *et al.*,
Plaintiffs-Appellants,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Intervenor-Appellee.

[Filed January 12, 1984]

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given, this 12th day of January, 1984, that Intervenor-Appellee, United States of America, appeals to the Supreme Court of the United States from that portion of this Court's decision of December 13, 1983 reversing the judgment of the District Court.

Respectfully submitted,

DAN K. WEBB
United States Attorney

By: _____

ANN L. WALLACE
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-8449

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT E. KOPP
Director, Appellate Staff
Department of Justice

ANTHONY J. STEINMEYER
THOMAS H. PEEBLES
Attorneys, Civil Division
Department of Justice

AFFIDAVIT OF MAILING

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

Linda J. Sindelar, being first duly sworn on oath deposes and says that she is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the 12th day of January, 1984, she placed a copy of

NOTICE OF APPEAL

in a Government franked envelope addressed to each of the following named individuals, and caused each envelope to be deposited in the United States mail chute located in the Everett McKinley Dirksen Building, Chicago, Illinois, on said date at the hour of about 5:00 p.m.

Howard J. Trienens, Esq.
George A. Platz, Esq.
Thomas M. Merill, Esq.
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

Paul F. Mickey, Jr.
NATIONAL RAILROAD PASSENGER CORP.
400 North Capitol Street, N.W.
Washington, D.C. 20001

Subscribed and sworn to before me this 12th day of January, 1984.

/s/ [Illegible]

_____
Notary Public

My Commission Expires: _____

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-3057

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Plaintiffs-Appellants,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Intervenor-Appellee.

[Filed January 10, 1984]

MOTION FOR STAY OF ISSUANCE OF MANDATE

Defendant-appellee National Railroad Passenger Corporation moves this Court for a Stay of Issuance of Mandate for the reason that a Notice of Appeal to the United States Supreme Court will be filed in this case.

Date: January 9, 1984

/s/ Paul F. Mickey, Jr.
PAUL F. MICKEY, JR.
Executive Vice President
Law and Public Affairs
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967

Attorney for National Railroad Passenger Corporation

Of Counsel:

HUGH C. GRIFFIN, ESQUIRE
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal and Motion for Stay of Issuance of Mandate was sent by first-class mail, postage prepaid, this 9th day of January, 1984, to:

Mr. Howard J. Trienens
SIDLEY & AUSTIN
One First National Bank Plaza
Chicago, Illinois 60603

Mr. Anthony J. Steinmeyer
Civil Division
United States Department of Justice
9th & Pennsylvania, N.W., Rm. 3740
Washington, D.C. 20530

/s/ Paul F. Mickey, Jr.
PAUL F. MICKEY, JR.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

January 20, 1984

Before

Hon. WILBUR F. PELL, JR. Circuit Judge

No. 82-3057

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, *et al.*,
Plaintiffs-Appellants,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division
No. 80-C-6749—Judge Bernard M. Decker

On consideration of the "MOTION FOR STAY OF ISSUANCE OF MANDATE" filed herein on January 10, 1984, by counsel for the defendant-appellee,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is hereby STAYED to and including February 21, 1984.

RELEVANT STATUTES

The Rail Passenger Service Act of 1970, Pub. L. 91-518, 84 Stat. 1328, provides in relevant part:

• • • •

Sec. 301. *Establishment of the Corporation*

"There is authorized to be created a National Railroad Passenger Corporation. The Corporation shall be for a profit corporation, the purpose of which shall be to provide intercity rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements. The Corporation will not be an agency or establishment of the United States Government. It shall be subject to the provisions of this chapter and, to the extent consistent with this chapter, to the District of Columbia Business Corporation Act [D.C. Code, sec. 29-901 *et seq.*]. The right to repeal, alter, or amend this chapter at any time is expressly reserved." 45 U.S.C. § 541.

Sec. 401. *Assumption of intercity rail passenger service by the Corporation—Contracts; passenger deficit payments; determination of the amount; referral to the Interstate Commerce Commission; payment schedule*

(a) (1) "On or before May 1, 1971, the Corporation is authorized to contract and, upon written request therefore from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service. On or after March 1, 1973, but before January 1, 1975, the Corporation is authorized to contract, and upon written request therefor, shall tender a contract to relieve the railroad of its entire responsibility for the provision of intercity rail passenger service and such relief shall become effective upon the date on which such contract is entered into. Contracts may be entered into on or before May 1, 1971, notwithstanding the fact that the decision of the Commission under section 502(6) of this title with respect to avoidable loss has not become final. Any contract entered into before such decision of the Commission has become final shall be subject to adjustment to assure that the contract is consistent with such final decision of the Commission. The contract may be made upon such terms and conditions as necessary to permit the Corporation to undertake passenger service on a timely basis. Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act [49 U.S.C. 1 *et seq.*] or any State or other law relating to the provision of intercity passenger service: Provided, That any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in section 13a(1) of the Interstate Commerce Act [49 U.S.C. 13a(1)].

(2) In consideration of being relieved of this responsibility by the Corporation, the railroad shall agree to pay to the Corporation each year for three years an amount equal to one-third of 50 per centum of the fully distributed passenger service deficit of the railroad as reported to the Commission for the year ending December 31, 1969. The payment to the Corporation may be made in cash or, at the option of the Corporation, by the transfer of rail passenger equipment or the provision of future service

as requested by the Corporation. Unless the railroad waives all rights to receive stock in exchange for its payments, the railroad shall receive common stock from the Corporation in an amount equivalent in par value to each payment.

(3) In agreeing to pay the amount specified in paragraph (2) of this subsection, a railroad may reserve the right to pay a lesser sum to be determined by calculating either of the following:

(A) 100 per centum of the avoidable loss of all intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969; or

(B) 200 per centum of the avoidable loss of the intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969, covering all intercity service over the routes between those points between which the Secretary, under sections 521 and 522 of this title, has specified that intercity passenger trains shall be operated within the basic system.

If the amount owed the Corporation under either of these alternatives is agreed by the parties to be less than the amount paid pursuant to paragraph (2), the Corporation shall pay the difference to the railroad and the railroad shall surrender to the Corporation an amount of stock, at par value, equivalent to such payment. If the railroad and the Corporation are unable to agree as to the amount owed, the matter shall be referred to the Interstate Commerce Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, or within such additional time as the Commission may order not to exceed an aggregate of one hundred and eighty days

following such date of referral, and its decision shall be binding on both parties.

(4) The payments to the Corporation shall be made in accordance with a schedule to be agreed upon between the parties. Unless the parties otherwise agree, the payments for each of the first twelve months following the date on which the Corporation assumes any of the operational responsibilities of the railroad shall be in cash and not less than one thirty-sixth of the amount owed." 45 U.S.C. § 561.

Sec. 405(f) [1972 Version] *Free or reduced-rate transportation for railroad employees; single systemwide schedule of terms and compensation; reimbursement of Corporation by railroad . . .*

"The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. The Corporation shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees under any policy or agreement referred to in

the first sentence of this subsection, including the costs of implementing and administering this section. Within ninety days after the enactment of this sentence, each railroad shall enter into an agreement with the Corporation for the payment of such expenses. If the Corporation and a railroad are unable to agree as to the amount of any payment owed by the railroad under this subsection, the matter shall be referred to the Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, and its decision shall be binding on both parties. If any railroad company which operates intercity passenger service not under contract with the Corporation notifies the Corporation and railroads which have entered into the agreement specified above that it will accept the terms of the systemwide schedule of terms and the compensation specified in the agreements, such railroad company shall be reimbursed for services to railroad employees in accordance with the agreements. As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence." 45 U.S.C. § 565 (as amended by Pub. L. 92-316, 86 Stat. 230 (1972)).

Sec. 405(f) [1979 Version] *Free or reduced-rate transportation for railroad employees; single systemwide schedule of terms and compensation; reimbursement of Corporation by railroads* . . .

"The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on

April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. Unless the Corporation and a railroad or group of railroads agree on a differment basis for compensation, the Corporation shall, during the 2-year period beginning on October 1, 1978, be reimbursed by each railroad at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile. Reimbursement at this rate is in lieu of any charges for liability incident to travel of railroad employees eligible for free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-rate transportation. . . . Nothing in this subsection shall preclude the Commission from ordering retroactive relief in any proceeding instituted or reopened after October 1, 1981. As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence." 45 U.S.C. § 565 (as amended by Pub. L. 96-73, 93 Stat. 547 (1979)).

BRIEF FOR THE UNITED STATES

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No. 83-1492

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL RAILROAD PASSENGER CORPORATION,
APPELLANT

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS APPELLEE IN SUPPORT OF THE APPELLANT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS APPELLEE IN SUPPORT OF THE APPELLANT

This case began in 1980 when five railroads (appellees here) sued the National Railroad Passenger Corporation (Amtrak), challenging the constitutionality of a reimbursement formula contained in a 1979 amendment to the Rail Passenger Service Act (RPSA), 45 U.S.C. (& Supp. V) 501 *et seq.* The reimbursement formula, 45 U.S.C. (Supp. V) 565(f), provides that the appellees are to reimburse Amtrak at a specified rate for free or reduced-rate travel on Amtrak trains by certain current and retired railroad employees and their dependents ("pass riders"). The appellees' principal contention was that the statutory reimbursement formula impaired their contractual right to be relieved of their responsibility for the provision of intercity rail passenger service.

Because the constitutionality of an Act of Congress was drawn in question, the United States intervened as a defendant. See 28 U.S.C. 2403(a). On November 22, 1982, the district court issued an opinion upholding the statute and dismissing the case (J.S. App. 11a-27a). The court first held that providing pass privileges had not been a legal responsibility of the railroads prior to the passage of RPSA, but was instead a wholly gratuitous practice on the part of the railroads. Accordingly, the court held that providing pass privileges was not among the "responsibilities" that Amtrak assumed after it took over the railroads' former common carrier obligations. The court further held that even under the "harshest possible scrutiny" (J.S. App. 25a) to which congressional regulation of commerce could be subjected, the pass rider reimbursement legislation did not violate due process. Finally, the district court held that Congress had acted rationally in setting the statutory reimbursement formula.

The court of appeals affirmed in part and reversed in part (J.S. App. 1a-10a). The court agreed with the district court's conclusion that the railroads had no contractual right to be free of *all* responsibility for reimbursing Amtrak for pass privileges. But the court invalidated the 1979 amendment on the theory that the reimbursement formula contained therein resulted in the railroads' being required to pay Amtrak amounts in excess of the incremental cost of employee pass privileges. The court reasoned that these additional amounts presumably went to support Amtrak's general operations and that the statute therefore impaired the railroads' contractual right to be relieved of all responsibility for the provision of intercity rail passenger service.

Throughout this litigation, the United States has defended the constitutionality of the statute, and it continues to do so in this Court. However, because Amtrak has already docketed its own appeal from the decision below, we have concluded that there is no need for the United States to docket a

separate appeal. Instead, we are filing this memorandum as an appellee in support of the appellant (see Rule 10.4 of the Rules of this Court) in order that the Court may give prompt consideration to Amtrak's appeal. We fully endorse Amtrak's arguments in support of the constitutionality of the statute (J.S. 8-15), and we join Amtrak in urging the Court to note probable jurisdiction in this case. We add only a few brief points in support of Amtrak's appeal.

1. At considerable cost to Amtrak, the court of appeals invalidated a statute that Congress has twice approved (see J.S. 6-7). The decision below is predicated on the erroneous assumption that the railroads' release from their former common carrier obligations constituted a *contractual* right to be free of all future obligations to provide funds that might be used for Amtrak's general operations.[1] The court of appeals failed to address the contention of Amtrak and the United States that, in releasing the railroads from their former common carrier obligations, Congress did no more than exercise its sovereign prerogative to provide regulatory relief to the railroads; it did not provide them with a contractual assurance of permanent immunity from reimposition of some portion of those obligations. The court's misunderstanding of Congress's action in turn led it to

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[1]Although the Contracts Clause of the Constitution (Art. I, § 10) applies only to the states, this Court has construed the Due Process Clause of the Fifth Amendment to impose analogous restrictions on the federal government. See, *e.g.*, *Continental Illinois National Bank & Trust Co.* v. *Chicago, R.I. & P. Ry.*, 294 U.S. 648, 680 (1935); *The Sinking-Fund Cases*, 99 U.S. 700, 718-719 (1878). But when Congress acts pursuant to its plenary commerce power or some other paramount power, courts have applied a more deferential standard of review than is generally accorded to state legislation arguably impairing contractual relations. See, *e.g.*, *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *United States* v. *Porhownik*, 182 F.2d 829, 832 (2d Cir.) (L. Hand, J.), cert. denied, 340 U.S. 825 (1950); *Amalgamated Meat Cutters & Butcher Workmen* v. *Connally*, 337 F. Supp. 737, 763 (D.D.C. 1971) (three-judge court) (Leventhal, J.).

misconstrue the Basic Agreement between Amtrak and the railroads.

a. The court of appeals found the railroads' contractual right in Section 2.1 of the Basic Agreement, which provides that "[f]rom and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service" (J.S. App. 2a). But this section of the Basic Agreement does no more than reiterate the terms of the release from common carrier responsibility authorized by the statute itself. See 45 U.S.C. 561(a). Moreover, only the United States, and not Amtrak, was empowered to release the railroads from their former common carrier responsibilities. Thus, Section 2.1 of the Basic Agreement has no force independent of Section 401 of the RPSA, 45 U.S.C. 561, and the railroads' alleged contractual rights must be analyzed in light of their statutory underpinnings.

b. Neither a state nor the federal government may barter away essential attributes of sovereignty. *Norman* v. *Baltimore & O.R.R.*, 294 U.S. 240, 309-310 (1935); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 436-437 (1934); *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia*, 245 U.S. 20, 23 (1917). For this reason, statutory enactments are presumed to be declarations of public policy that do not create contractual obligations binding upon the government. *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). A statute is itself treated as a contract only "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.14 (1977).

No such intent may be discerned in the RPSA. On the contrary, Congress "expressly reserved" its right to "repeal, alter, or amend [the RPSA] at any time" (45 U.S.C. 541). It

is thus clear that when Congress authorized the railroads' release from their former common carrier obligations, it was not bargaining away its power to regulate interstate commerce. Section 401 of the RPSA, 45 U.S.C. 561, the terms of which are repeated in Section 2.1 of the Basic Agreement, is part of a statutory scheme in which the sovereign granted regulatory relief to promote the Amtrak experiment. It is not a statute by which the sovereign conferred any sort of contractual immunities upon the railroads.[2] And Section 2.1 of the Basic Agreement confers no greater rights upon the railroads than the authorizing statute.

The court of appeals erred in reading more into the Basic Agreement than the statute authorized Amtrak to provide. Had the court properly construed the statute as an exercise of Congress's regulatory powers, any doubt as to its constitutionality would have been avoided. Cf. *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979). The only question in the case then would have been whether the statutory reimbursement formula is a reasonable regulation of commerce.

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[2] In the district court, the appellees argued that if the release accorded to the railroads in Section 401 of the RPSA were found to be a declaration of public policy, subject to Congress's power to revise or repeal, the government would have the "power to come in the next day and totally cancel that release." Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment 20. The railroads are clearly correct — Congress *does* have the authority under the Commerce Clause (Art. I, § 8, Cl. 3) to cancel the entire RPSA experiment and revert back to the pre-1971 situation. The exercise of such power would of course be subject to general due process considerations. See, *e.g.*, *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947, 960 (7th Cir. 1979), aff'd, 446 U.S. 359 (1980). Moreover, an affected railroad might be able to show that cancellation amounted to a taking for which just compensation would be due. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-124 (1978). What is clear, however, is that such a statutory cancellation would not violate the principles of the Contracts Clause made applicable to the federal government through the Due Process Clause.

As to that issue, the court of appeals itself had "no doubt that the 1979 amendment may be sustained as a legitimate exercise of the commerce power" (J.S. App. 9a). This conclusion should have ended the court's inquiry.

2. The court of appeals also erred in refusing to give deference to Congress's policy choice in calculating and allocating the cost of pass rider privileges. As the district court recognized in rejecting the railroads' due process challenge to the statutory reimbursement formula (J.S. App. 19a-26a), this is an area in which judicial deference to legislative judgment is especially mandated. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

In *Turner Elkhorn*, this Court rejected a constitutional challenge by coal mine operators to Congress's method of calculating and apportioning the costs of employee death or disability compensation resulting from black lung disease. The Court held that Congress's method represented a "rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers" (428 U.S. at 18). Refusing to "assess the wisdom of Congress' chosen scheme" for allocation of financial responsibility, the Court concluded (*id.* at 18-19):

> It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.

The 25% service-value formula chosen by Congress here also approaches the problem of cost allocation and calculation in a rational manner and should have been upheld by the court of appeals. Congress did not act whimsically when it adopted this formula. In deciding that the railroads should compensate Amtrak for pass rider privileges,

Congress knew that the persons receiving such privileges were employees of the railroads who had expectations created by the railroads. Like the coal operators in *Turner Elkhorn*, the railroads here have "profited from the fruits of their [employees'] labor" (*Turner Elkhorn*, 428 U.S. at 18).

Moreover, as the Comptroller General concluded in a report requested by Congress (see J.S. 2, 6-7), pass rider privileges provide benefits to the employer-employee relationship in the railroad industry. The railroads benefit, the Comptroller General stated, "when their employees have a higher morale and better relationship with their employers because of their passes." GAO, Comptroller General, *Nos. B-196907, CED-80-83, Report To The Congress*, "How Much Should Amtrak Be Reimbursed For Railroad Employees Using Passes To Ride Its Trains?." at 19 (Mar. 28, 1980) (hereinafter cited as *GAO Report*).[3]

Before finally settling on the reimbursement formula at issue in this case, Congress fully considered a range of alternatives. See J.S. 6-7; J.S. App. 15a. But as the *GAO Report* noted, the "intangible benefits [of pass privileges] are difficult, if not impossible, to quantify" (*GAO Report* 18). In these circumstances, whether a formula based on administrative cost, or based on some percentage of the system-wide average yield other than 25%, "would have been wiser or more practical" is not here, any more than in *Turner Elkhorn*, a "question of constitutional dimension" (428 U.S. at 19).

Since the formula chosen by Congress was eminently reasonable, the court of appeals' judgment invalidating the statute must fall even on the assumption that Section 2.1 of

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[3]When Amtrak instituted a restrictive pass rider policy in 1971, employees of the Penn Central threatened to strike over the issue of pass privileges. The threat was sufficiently serious for a federal court to issue a temporary restraining order against the strike. See *Baker* v. *System Federation No. 1*, 331 F. Supp. 1363, 1365 (E.D. Pa. 1971).

the Basic Agreement created contractual rights in the railroads independent from the authorizing statute. As a matter of construction, Section 2.1 should not have been interpreted to prevent Congress from making reasonable adjustments to the allocation of costs attributable to activities that provide the railroads with continuing benefits. Further, even if the statutory formula is deemed inconsistent with the contract, it is not an "impairment": Contracts Clause principles do not preclude Congress from enacting regulatory legislation that serves a substantial public interest, even if the regulation has the effect of adjusting rights and liabilities under a contract. See *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 240-244 (1978).

It is therefore respectfully submitted that probable jurisdiction should be noted.

REX E. LEE
Solicitor General

MARCH 1984

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MOTION

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No. 83-1492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL RAILROAD PASSENGER CORPORATION,

Appellant,

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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MOTION TO DISMISS OR AFFIRM

HOWARD J. TRIENENS
GEORGE A. PLATZ*
THOMAS W. MERRILL
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees

Of Counsel:

RICHARD K. KNOWLTON
MEGAN K. RICKE
THOMAS L. SAMUEL
PAUL A. CONLEY, JR.

May 18, 1984

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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No. 83-1492

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v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

MOTION TO DISMISS OR AFFIRM

The National Railroad Passenger Corporation ("Amtrak") appeals from a judgment of the United States Court of Appeals for the Seventh Circuit which holds that Amtrak may not compel the five appellee railroads ("Railroads") to make certain payments to Amtrak based upon Section 405(f) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 565(f). The Railroads hereby move to dismiss or affirm on the grounds that the appeal is not authorized by

28 U.S.C. § 1252 and the question presented is so unsubstantial as not to require further argument.[1]

COUNTERSTATEMENT OF THE CASE

The key facts on which this appeal turns, some of which are not fully set forth in Amtrak's Jurisdictional Statement ("Jur. St."), are as follows:

In the late 1960s, over one hundred proceedings were pending before the Interstate Commerce Commission seeking abandonment of rail passenger service. H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. 2-3 (1970). Congress responded to this crisis by enacting the Rail Passenger Service Act of 1970. The Act created a new federal corporation—Amtrak—and established a mechanism whereby the railroads could be relieved of their responsibility for intercity rail passenger service. Section 401(a)(1) of the RPSA, 45 U.S.C. § 561(a)(1), provided that upon the request of a railroad, Amtrak was to enter into "a contract" (subsequently called a "Basic Agreement") which would "relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service." The Act went on to provide, in Section 401(a)(2), 45 U.S.C. § 561(a)(2), that "[i]n consideration of being relieved of this responsibility," the railroad was to pay Amtrak certain sums of money and take on certain other obligations. Although not all railroads were

[1] A current statement on behalf of the Railroads pursuant to Rule 28.1 appears at pages 11-15 of their Jurisdictional Statement on Cross Appeal in No. 83-1633, filed April 6, 1984.

willing to agree to such terms, the five appellee Railroads accepted the offer. They entered into the Basic Agreement, paid Amtrak collectively more than $80 million, and discontinued all their intercity rail passenger operations (including travel privileges to employees) as of April 30, 1971. On May 1, 1971, Amtrak commenced its rail passenger service, operating many of the routes discontinued by the Railroads as well as other routes.

In 1972 Congress added Section 405(f) to the RPSA, which required Amtrak to provide travel privileges (often called "pass privileges") over its entire system to railroad employees and their dependents who had pass privileges of any kind on April 30, 1971. The new statute expressly provided that these privileges would apply *only to the extent that space was available*. Pursuant to this amendment, Amtrak adopted a uniform policy that afforded either free or half-fare travel to such persons, depending upon certain eligibility standards. Employees of the Railroads received these privileges because on April 30, 1971, they had received some form of pass privileges over the lines of their respective employers.

The 1972 version of Section 405(f) also required the railroads to pay for the "cost" of the Amtrak privileges given to the employees, and authorized the Interstate Commerce Commission to determine that cost. The Commission, applying an incremental cost approach because of the "space available" nature of the privileges, found that the cost of the privileges was $.00079 (less than one-tenth of a cent) per mile, and that the half-fares received by Amtrak from many statutory pass riders more than offset this cost. *Cost Reimbursement, Rail Passenger Service Act*, 347 I.C.C. 325 (1972) (as corrected by subsequent unpublished order).

Notwithstanding the Commission's finding as to costs, in 1979 Congress amended Section 405(f) to provide that, unless Amtrak and a railroad or a group of railroads agreed on a different basis for compensation, a railroad was required to pay Amtrak for each mile of travel by its statutory pass riders an amount equal to 25% of the average system-wide revenues per mile received by Amtrak. Under this provision, which was re-enacted in 1981, Amtrak has exacted payments from the Railroads in excess of 2 cents per mile. Moreover, these payments, which thus far total more than $5 million, have been compelled for half-fare as well as free travel by statutory pass riders. It is this 25% reimbursement formula which the Court of Appeals held unenforceable by Amtrak, on the ground that it grossly exceeds the cost of the pass privileges and thus constitutes a forced subsidy of intercity rail passenger service to the *general public*, from which the Railroads had been relieved of responsibility by Section 401(a) of the RPSA and the Basic Agreements.

ARGUMENT IN SUPPORT OF MOTION

1.

AMTRAK'S APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Jurisdiction lies under 28 U.S.C. § 1252 only from a decision of a lower federal court "holding an Act of Congress unconstitutional." Although the argument in the Court of Appeals focused on the constitutionality of Section 405(f) of the RPSA, the Court of Appeals did not hold any part of that statute unconstitutional. On the contrary, the court was careful to note that the only question it was deciding was "whether Amtrak may bill the railroads at the statutorily authorized rate and *not whether the statute itself is valid*" (Jur. St. at 8a, emphasis supplied). Indeed, Amtrak concedes that the Court of Appeals did not expressly declare that the reimbursement formula was unconstitutional. (Jur. St. at 3.)

It is true that 28 U.S.C. § 1252 provides jurisdiction "even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' that the lower court granted." *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982), quoting *United States v. Clark*, 445 U.S. 23, 26 n.2 (1980). But here, a judgment of unconstitutionality was *not* a "necessary predicate" to the Court of Appeals' decision. Section 405(f) of the RPSA requires imposition of the 25% reimbursement formula "*[u]nless the Corporation [Amtrak] and a railroad or group of railroads agree on a different basis for compensation.*" As the Court of Appeals noted, the Railroads' release

from all responsibility for rail passenger service is contained not only in Section 401(a) of the RPSA, but is also set forth in paragraph 2.1 of the Basic Agreement. (Jur. St. at 4a.) By construing the release, and thus the Basic Agreement, as prohibiting any payment which would entail a subsidy of Amtrak's general passenger operations (Jur. St. at 8a), and by concluding that the 25% formula constituted such a subsidy (Jur. St. at 10a), the Court of Appeals necessarily found that the *Basic Agreement* provides for "a different basis for compensation" than the statute, making the statutory formula inapplicable by its own terms.

Such a disposition of the case on the basis of the language of Section 405(f) and the terms of the Basic Agreements is consistent with the well established principle that "the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case", *Escambia County v. McMillan*, 104 S.Ct. 1577, 1579 (1984), as well as this Court's admonition to "read the two sections [of a statute] as consistent rather than conflicting, if that be possible." *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942). Because the Court of Appeals did not declare Section 405(f) unconstitutional, and because such a declaration was not a "necessary predicate" of its judgment, Amtrak's appeal should be dismissed for want of jurisdiction. Treating the Jurisdictional Statement as a petition for writ of certiorari, the petition should be denied for the reasons stated in Part 3 hereof, pages 12-13, *infra*.

2.

THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE QUESTION PRESENTED BY AMTRAK'S APPEAL IS NOT SUBSTANTIAL.

Even if the Court of Appeals decision were read as holding the 25% reimbursement formula unconstitutional, the decision presents such a narrow and insubstantial question of federal constitutional law that it should be summarily affirmed. To invalidate the 25% reimbursement requirement on constitutional grounds, the court would have to draw but three simple conclusions: (a) that the release from all responsibilty for intercity rail passenger service given to the Railroads in 1971 is a contractual right protected under the Fifth Amendment; (b) that this contractual right would be substantially impaired by requiring the Railroads to pay millions of dollars to Amtrak to subsidize general passenger operations; and (c) that application of the 25% reimbursement formula of Section 405(f) results in precisely such a subsidy.

(a)

It has long been established that contract rights are protected by the Fifth Amendment. This is true whether the rights arise out of a contract with the United States itself, see *Thorpe v. Housing Authority*, 393 U.S. 268, 278 n.31 (1969); *Perry v. United States*, 294 U.S. 330 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Rights against the United States arising out of a contract with it are protected by the Fifth Amendment"); or out of private contractual understandings. See *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980). The contract rights of the Railroads involved here fall into the former category as well at the latter. Although the Basic Agreements

are contracts between the Railroads and Amtrak, the offer of the release from all responsibility for intercity rail passenger service was made in Section 401 of the RPSA and was, indeed, a promise that could only be fulfilled by the United States. That a legislature may contractually obligate itself in such a manner is established by *United States Trust Co. v. New Jersey*, 431 U.S. 1, 18 (1977). And impairments of such government obligations "face more stringent examination" than impairments of purely private obligations. *Id.* at 26.

The United States in its memorandum argues that Section 401(a) of the RPSA did not give the Railroads any contractual rights, but merely granted them unilateral "regulatory relief" (U.S. Mem. at 3). This assertion, however, flies in the face of the language of both Section 401(a), which speaks of the release as a "valid contract" given to the railroads in return for "consideration" (including payment of more than $80 million by the appellee Railroads and of an even greater amount by other railroads), and the Basic Agreements themselves, which expressly contain a contractual release from all responsibility for intercity rail passenger service. Nor is the release qualified by the reservation by Congress of the power to amend the RPSA in Section 301 of the RPSA, 45 U.S.C. § 541. Although this reservation would allow Congress to withdraw the offer of release for the future, Congress "did not and could not destroy or impair the previously vested rights of the [Railroads]." *Coombes v. Getz*, 285 U.S. 434, 442 (1932). Finally, the promise made in Section 401(a) is not rendered illusory because Congress may not "barter away essential attributes of sovereignty" (U.S. Mem. at 4). Section 401(a) does not "barter away" any power of Congress to regulate intercity rail passenger service; it constitutes merely an exercise of the well-established ability of the United States to bind itself to enforceable financial obligations. See *Perry v. United States*, 294 U.S. 330 (1935).

(b)

It is also clear that the contractual release granted to the Railroads would be substantially impaired by a requirement that the Railroads subsidize Amtrak's general passenger operations. The release provides that a contracting railroad is relieved of "its entire responsibility for the provision of intercity rail passenger service." Section 401(a) of the RPSA goes on to explain that this includes "all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act or any State or other law relating to the provision of intercity passenger service." Whatever else may be included within the term "entire responsibility for the provision of intercity rail passenger service", no one has ever contended that this does not include liability for deficits incurred by general intercity rail passenger operations. The whole point of the RPSA was to shift responsibility for these deficits from the railroads to Amtrak in consideration of the payments made by contracting railroads. See 116 Cong. Rec. 36658 (1970). Clearly, therefore, any attempt by Congress to force the Railroads to absorb part of these deficits by subsidizing Amtrak's general passenger operations would constitute a direct and substantial impairment of the release.

Without denying the force of this argument, Amtrak asserts that the 25% reimbursement requirement is within the power of Congress under the Commerce Clause and thus cannot be invalidated as long as it constitutes "a reasonable means to accomplish a legitimate end" (Jur.

St. at 10). Amtrak's argument improperly ignores the fact that the release is protected by the Fifth Amendment's Due Process and Just Compensation Clauses. Even assuming that in the absence of such a contractual release the Fifth Amendment would permit the government to exact payments for services unrelated to their costs (*but see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980)), it does not do so when the government has, in exchange for substantial consideration, expressly contracted not to require such payments. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

Amtrak further contends that Section 405(f) of the RPSA is constitutional because it serves the "important legislative purposes" of "preserving labor peace" and "preserving pass travel" (Jur. St. at 13). The Railroads do not, however, challenge the power of Congress to require Amtrak to provide pass travel in order to "preserve labor peace." The issue here is whether the Railroads can be required to pay some of Amtrak's costs incurred in providing intercity rail passenger service. Relieving Amtrak from such costs is not "reasonable and necessary" to serve any important public purpose and thus cannot justify an impairment of the Railroads' contract rights. *United States Trust Co. v. New Jersey, supra*, 431 U.S. at 29.

(c)

Finally, the Court of Appeals had ample grounds to conclude that the 25% reimbursement requirement was a forced subsidy of Amtrak's general passenger operations. The Court of Appeals noted that under Section 405(f), pass rider privileges are provided on a "space available" basis only. "Thus, passholders occupy seats that would otherwise be empty. There is no evidence that Amtrak operates scheduled passenger trains contingent on the adequate sale of tickets." (Jur. St. at 10a.) This makes it abundantly clear that the only costs incurred because of the pass rider program are variable or incremental costs. The Interstate Commerce Commission has determined not only that these variable or incremental costs are a small fraction of the 2 plus cents per mile calculated under 25% formula, but also that such costs are offset by a wide margin by the *additional* revenues that Amtrak receives from pass riders paying half fare. *Cost Reimbursement, Rail Passenger Service Act*, 347 I.C.C. 325 (1972). Thus, virtually all of the payments under the 25% reimbursement formula represent a subsidy of Amtrak's general passenger operations—a "windfall" in the Court of Appeals' words. (Jur. St. at 10a).

Amtrak and the United States do not directly attack this conclusion. Instead, they assert that Congress has discretion to require the Railroads to pay more than the "incremental cost" of the pass rider program without running afoul of the release in Section 401(a) of the RPSA and the Basic Agreement (Amtrak Jur. St. at 8-10; U.S. Mem. at 6-8). They do not, however, propose any other valid test for separating the expenses properly allocable to the "space available" privileges created by Section 405(f) from the expenses of providing passenger services to the public. The "fair value of services" test mentioned by Amtrak (Jur. St. at 9) does not adequately protect the Railroads against impairment of their contractual release where the "fair value" is determined unilaterally by Congress, and where the services being "valued" are not even being given to the Railroads.

The 25% reimbursement formula cannot be defended as a permissible measurement of the cost of the pass privi-

leges, however calculated, because it was never intended to constitute such a measurement. The legislative history of the amendment expressly recites that "the new formula reflects revenue considerations rather than cost considerations." S. Rep. No. 96-183, 96th Cong., 1st Sess. 10 (1979). And the 1979 version of Section 405(f) specifically instructed the GAO to take into account "the value of the services being provided" in recommending whether the 25% formula should be retained. P.L. 96-73 §120(b), 93 Stat. 547 (1979).

3.

THIS CASE PRESENTS AN UNUSUAL AND NONRECURRING ISSUE OF DECLINING IMPORTANCE WHICH DOES NOT WARRANT INTERVENTION BY THIS COURT.

Amtrak's appeal lacks substance for additional reasons unrelated to the merits of the Court of Appeals decision. Contrary to Amtrak's assertion that the decision below "poses a significant threat to the success of the Amtrak experiment" (Jur. St. at 15), the judgment is narrowly drawn. It concerns only the question whether Amtrak can demand, as a basis for reimbursement for statutory pass riders, an amount which represents a subsidy to Amtrak's general passenger operations. The decision does not prevent Congress from enacting some other reimbursement requirement, as long as that requirement is limited to reimbursement for the actual costs of the pass program. Moreover, it has no bearing on other amendments or adjustments to the Rail Passenger Service Act unrelated to the issue of reimbursement for pass riders.

In addition, the judgment below is of diminishing importance. The reimbursement requirement which the Court of Appeals held could not be enforced pertains only

to railroad employees and retirees holding pass privileges as of April 30, 1971; it does not apply to employees and retirees who did not have pass privileges on that date or who joined the railroads thereafter. Thus, the number of affected employees and the size of the reimbursement at issue are constantly decreasing, and will eventually disappear altogether. Consequently, the issue between the parties not only has little legal significance but is at best of transient practical importance as well.

CONCLUSION

For the reasons stated, the appeal in this matter should be dismissed, or the judgment below should be summarily affirmed.

Respectfully submitted,

HOWARD J. TRIENENS
GEORGE A. PLATZ*
THOMAS W. MERRILL
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees

Of Counsel:
RICHARD K. KNOWLTON
MEGAN K. RICKE
THOMAS L. SAMUEL
PAUL A. CONLEY, JR.

May 18, 1984

* Counsel of Record

REPLY BRIEF

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No. 83-1492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL RAILROAD PASSENGER CORPORATION,
Appellant,

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF APPELLANT OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
NATIONAL RAILROAD
PASSENGER CORPORATION
400 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF APPELLANT OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

On May 18, 1984, Appellee Railroads filed a Motion to Dismiss or Affirm the appeal of Appellant National Railroad Passenger Corporation ("Amtrak") designated No. 83-1492. The Railroads' submission warrants this brief response, as permitted by Supreme Court Rule 16.5.

I. THE COURT OF APPEALS VOIDED THE STATUTORY REIMBURSEMENT REQUIREMENT OF THE 1979 AMENDMENT ON CONSTITUTIONAL GROUNDS, THUS BRINGING THIS APPEAL SQUARELY WITHIN THE SUPREME COURT'S APPELLATE JURISDICTION UNDER 28 U.S.C. § 1252

The Railroads assert that this matter does not fall within the Court's appellate jurisdiction under 28 U.S.C. § 1252 because the Court of Appeals declared the 1979 Amendment to be merely "unenforceable," rather than invalid, and because its ruling was not stated in constitutional terms.

Although the Court of Appeals stated that it was not deciding "whether the statute itself is valid," its decision plainly held the reimbursement requirement to be invalid. The statute directs the Railroads to compensate Amtrak at the 25%-of-yield rate. Now the Court of Appeals has said that they need not pay at that rate. Notwithstanding the court's protestation to the contrary,[1] unmistakably it has abrogated Congress' command.

The court studiously avoided describing the 1979 Amendment as "unconstitutional," but its reasoning and its citation of authorities such as *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980), make plain its conclusion that the Railroads' right to due process has been violated. Moreover, the basic premise of the court's decision—that the government may not require payments for services in excess of the incremental cost of providing those services—must have been derived from the court's view of constitutional limitations on Congress' legislative power. The court expressly ruled that the Basic Agreement did not relieve the Railroads of any obligation to pay for their employees' pass privileges—indeed, the Basic Agreement did not even address the issue. Accordingly, the court's determination must have rested on the view that the Railroads have some other legal right—presumably one found in the Due Process Clause of the Fifth Amendment—to pay no more than incremental costs for their employees' pass travel.

[1] The court's characterization of the issue—whether Amtrak may bill at the prescribed rate—makes no sense. The issue is not Amtrak's ability to collect; instead, it is the Railroads' obligation to pay. Indeed, there is no legal action Amtrak itself could take to compel the Railroads to pay more for statutory pass privileges than they are willing to pay, since section 307(a) of the Rail Passenger Service Act, 45 U.S.C. § 547(a), provides that only the U.S. Attorney General may bring an action against a railroad seeking to enforce the terms of the RPSA. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974).

The Railroads attempt to show that no constitutional issue is presented by turning to the clause in the 1979 Amendment stating that the 25%-of-yield formula shall apply "[u]nless the Corporation and a railroad or group of railroads agree on a different basis of compensation . . . ." 45 U.S.C. § 565(f). For the first time the Railroads contend that, as is permitted by the statute, they have in effect agreed with Amtrak that a reimbursement formula other than the 25%-of-yield statutory standard should apply. This claim is based on the notion that Amtrak and the United States "agreed" in 1971 strictly to limit the costs the Railroads could be required to pay for employee pass travel.[2] The Railroads not only say that such an agreement was reached; beyond that, they assert that the Court of Appeals *necessarily* found as much. Motion to Dismiss or Affirm at 6.

These assertions are clearly incorrect. The Court of Appeals did not even mention the language in the statute permitting agreement on a different reimbursement for-

[2] The Railroads have a notably unclear understanding of the terms of the agreement on payments for employee pass privileges that was supposedly reached in 1971. In their Motion to Dismiss or Affirm, they say the agreement was that they could be required to pay no more than incremental costs; in their Cross-Appeal, No. 83-1633, they argue that the agreement was that they could be required to pay no costs whatsoever.

mula. Moreover, the court said nothing to suggest that Amtrak's contract with the Railroads addressed the issue of compensation for pass travel. To the contrary, the court flatly rejected the Railroads' contention that the Basic Agreement promises them relief from responsibility for employee pass privileges. Against that background, the assertions that Amtrak and the Railroads have "agreed" on alternative compensation and that the "unless otherwise agreed" language of the statute underlies the court's decision should be dismissed out of hand.[3]

In sum, the Court of Appeals has voided a portion of a federal statute on constitutional grounds. Accordingly, the matter falls within this Court's appellate jurisdiction under 28 U.S.C. § 1252.

II. THE COURT OF APPEALS' DECISION RESTS ON ERRONEOUS CONCLUSIONS OF CONSTITUTIONAL LAW THAT SHOULD BE CORRECTED BY THIS COURT

The substantive arguments set forth in the Railroads' Motion to Dismiss or Affirm are no more persuasive than those addressed to jurisdiction. The Railroads have reduced the case to a tidy three-part logical progression; the problem is, two of their three premises are incorrect.

The Railroads' reasoning runs as follows:

> (a) that the release from all responsibility for intercity rail passenger service given to the Railroads in 1971 is a contractual right protected under the Fifth Amendment; (b) that this contractual right would be substantially impaired by requiring the Railroads to pay millions of dollars to Amtrak to subsidize general passenger operations; and (c) that application of the 25% reimbursement formula of Section 405(f) results in precisely such a subsidy.

Motion to Dismiss or Affirm at 7. Of these three statements, only the second is correct. *If* the Railroads had an enforceable contract right not to be required to support intercity rail passenger service, and *if* they were required to spend millions of dollars on general intercity rail passenger subsidies, their contract right might well be "substantially impaired." The fact is, however, that they have neither a binding contract right to be free of all burdens associated with rail passenger service,[4] nor a plausible claim that the monies they are required to pay under the 1979 Amendment constitute general subsidies of passenger service.

Again, the principal error the Railroads and the Court of Appeals have committed is to assume that any payment in excess of the incremental cost of providing em-

[3] The Railroad's argument can also readily be rejected as a matter of statutory interpretation. Congress cannot have intended the "unless otherwise agreed" clause, which was drafted in *1979*, to embrace the supposed agreement in *1971* to limit the Railroads' obligation to pay for employee pass travel. Aside from the chronological problem, there is also the fact that the statute speaks of *Amtrak's* agreement on a different rate, whereas the Railroads' challenge to the statute rests on the claim that the *United States* promised them relief—a promise, they stress, that *only* the United States could fulfill. Motion to Dismiss or Affirm at 8.

[4] Even if the Railroads could somehow show that in 1971 Congress relieved them of all financial responsibility for employee pass privileges, their claim of unconstitutional impairment would still not prevail. The United States, in its Memorandum as Appellee in Support of the Appellant, has aptly stated the reasons why the Railroads do not have a binding contractual right enforceable against the United States indefinitely to be free of all passenger service responsibilities. The overriding reason is of course that the United States cannot bind itself not to exercise its essential powers, including the power to regulate commerce. More immediately, on the facts of this case the United States has given no indication that it intended to be bound. Finally, no matter how often the Railroads describe the statute as a "financial" undertaking, to bring it within the rule of *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the fact remains that the United States and the Railroads were not striking a financial bargain in 1971, nor did the United States create any "investment-backed expectations" to which it should be held. Instead, the United States offered the Railroads a grant of regulatory relief, creating no reasonable expectation of immutability.

ployee pass privileges must be regarded as payment made for some purpose other than pass travel. There is no basis, in the Constitution or in economic common sense, for assuming that Congress may assess the Railroads only incremental costs for the pass benefits granted to their employees. Neither the Court of Appeals nor the Railroads advance any reason why, for example, some allocation of the full costs of pass travel is not appropriate, when Congress takes into account the direct benefit of pass travel to the Railroads' employees and to the Railroads themselves.

The legislative record placed before the Court of Appeals demonstrates that Congress had these benefits in mind when it adopted a value-based reimbursement formula. Congress took into account many factors of which the Railroads make no mention in their submission: the facts, for example, that the freight railroads themselves instituted the privilege; that they created, and benefitted directly from, a strong expectancy on the part of their employees that lifetime pass privileges would be available; and that the railroads pressed Amtrak hard to have pass privileges continued, warning that they would encounter serious labor problems if pass privileges were abandoned.[5] Congress responded with a narrowly drawn legislative provision guaranteeing privileges to only those railroad employees who had earned them before Amtrak's assumption of service in 1971—a group which, as the Railroads' submission notes, is "constantly decreasing, and will eventually disappear altogether." Motion to Dismiss or Affirm at 13. Particularly where Congress has adopted such a measured response, courts should be far more deferential toward its judgment concerning the

[5] *See* Amtrak's Jurisdictional Statement at 5 & n.3, 5; 12-13 & n.15, 18. The General Accounting Office, in its statutorily mandated study of pass rider reimbursement, determined that the Railroads clearly benefit from the pass privileges of their employees. GAO Report, Court of Appeals Record R. 36, Exh. 8, at 18-19.

proper allocation of economic benefits and burdens than the Court of Appeals was in this case.

The Railroads and the Court of Appeals assume that when the Railroads were relieved of their obligation to provide intercity rail passenger service, they were somehow put on a better footing than other employers with respect to obligations to their employees. That is simply not the case. Irrespective of their release from passenger service, the Railroads, like all other employers, may be required to assume reasonable financial obligations stemming from legislative protection of the welfare of their employees—particularly where, as in this case, the obligations are for services that are of benefit to both employee and employer.

The Railroads assert that the issues raised by this appeal are insubstantial and not worthy of the Court's attention. Amtrak concedes that the dollar sums involved are not of great magnitude,[6] but the principles involved—most notably, whether Congress may require payments for services in excess of incremental costs—are substantial and worthy of this Court's attention.

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
NATIONAL RAILROAD
PASSENGER CORPORATION
400 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967

* Counsel of Record

[6] We note that throughout this litigation the Railroads themselves have stressed that substantial sums of money are involved, in order to defeat any suggestion that they have suffered only "minimal" impairment of the total value of their contract rights and thus have no claim of constitutional dimension. *See Allied Structural Steel v. Spannaus*, 438 U.S. 234, 245 (1978).

APPELLANT'S BRIEF

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On Appeal from the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR APPELLANT

Of Counsel:
WILLIAM R. PERLIK
DAVID R. JOHNSON
ANDREA TIMKO SALLET
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
JAMES J. ROBERTS
Associate General Counsel
NATIONAL RAILROAD
PASSENGER CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967
Attorneys for Appellant

* Counsel of Record

November 15, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that a statute requiring the Railroads to reimburse Amtrak for rail travel privileges accorded to the Railroads' employees was unenforceable, on the ground that fees exceeding incremental costs constituted an impermissible subsidy of intercity rail passenger service?

2. Whether a statute requiring the Railroads to pay for benefits provided to them and their employees substantially impairs the Railroads' right to be relieved of responsibility to provide intercity rail passenger service, in violation of the Due Process Clause of the Fifth Amendment?

PARTIES

In addition to the parties identified in the caption above, the United States has appeared in both courts below and is participating in this appeal as an Appellee in Support of Appellant Amtrak.*

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* Amtrak is a mixed-ownership corporation chartered under the laws of the District of Columbia in accordance with section 301 of the Rail Passenger Service Act, 45 U.S.C. § 541. Amtrak is not a subsidiary of any other corporation. Amtrak owns 100% of the capital stock of the Chicago Union Station Company and of the Washington Terminal Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1492

NATIONAL RAILROAD PASSENGER CORPORATION,
Appellant,

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR APPELLANT

Appellant National Railroad Passenger Corporation ("Amtrak") appeals from the final judgment of the United States Court of Appeals for the Seventh Circuit, issued December 13, 1983, holding unenforceable a provision of the Rail Passenger Service Act, 45 U.S.C. § 501

et seq. (1982), requiring Appellee railroads ("Railroads") to pay Amtrak a stated level of reimbursement for rail travel privileges accorded the Railroads' employees and former employees.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, issued on December 13, 1983, is reported as *Atchison, Topeka, and Santa Fe Railway v. National Railroad Passenger Corp.*, 723 F.2d 1298 (7th Cir. 1983), and is reprinted in the Appendix to Amtrak's Jurisdictional Statement at 1a.

The case was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, and was designated No. 80-C-6749. The court's Memorandum Opinion and Order, issued on November 22, 1982, by the Honorable Bernard M. Decker, is unreported. It is reprinted in the Appendix to Amtrak's Jurisdictional Statement at 11a.

BASIS FOR JURISDICTION

On December 13, 1983, a panel of the United States Court of Appeals for the Seventh Circuit issued a decision declaring that enforcement of the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, would impair the Railroads' contractual rights in a constitutionally impermissible manner. Amtrak filed a Notice of Appeal in the Court of Appeals on January 10, 1984. The United States filed a separate Notice of Appeal on January 12, 1984.

Jurisdiction of this Court to entertain this appeal lies under 28 U.S.C. § 1252 (1982). On October 1, 1984, the Court noted probable jurisdiction. The Railroads have filed a cross-appeal (No. 83-1633), and on October

1, 1984, the Court postponed a decision on probable jurisdiction in that case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a. Constitutional Provision

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

b. Statutory Provisions

The statute at issue is the Rail Passenger Service Act ("RPSA"), Pub. L. No. 91-518, 84 Stat. 1328, 45 U.S.C. § 501 *et seq.* (1976), as amended, and in particular sections 301, 401 and 405(f) thereof (45 U.S.C. §§ 541, 561, and 565(f)). Section 405(f) of the RPSA was first enacted in 1972 by Pub. L. No. 92-316, § 8, 86 Stat. 227, 230, and was amended in 1979 by the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, § 120, 93 Stat. 537, 547-48, and in 1981 by the Amtrak Improvement Act of 1981, Pub. L. No. 97-35, § 1184, 95 Stat. 357, 697.

Sections 301 and 401 of the RPSA, and 405(f) (in its 1972 and 1979 versions), are set out in the Appendix to Amtrak's Jurisdictional Statement at 40a-45a. The 1981 amendment states:

> Sec. 1184. The third sentence of section 405(f) of the Rail Passenger Service Act (45 U.S.C. § 565) is amended by striking out ", during the 2-year period beginning on the effective date of the Amtrak Reorganization Act of 1979,".

Pub. L. No. 97-35, § 1184, 95 Stat. 357, 697.

STATEMENT OF THE CASE

Before the creation of Amtrak in 1971, intercity rail passenger service was provided by numerous private railroad companies. In 1946 those companies operated some 11,000 passenger trains throughout the United States; by 1970, there were fewer than 500, of which over 100 were the subject of discontinuance proceedings before the Interstate Commerce Commission ("ICC").[1] Many of the remaining passenger trains were incurring substantial losses, and the Congress recognized that a large number of them held no promise of future financial success.[2] In 1969 the rail passenger deficit was approximately $200 million.[3]

"[F]aced with the immediate threat of complete curtailment of rail passenger service," [4] Congress responded by enacting the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.* ("RPSA"). The RPSA authorized the creation of Amtrak as a for-profit corporation responsible for providing intercity rail passenger service throughout the United States.[5] The basic purpose of the RPSA was to "prevent the complete abandonment of intercity rail passenger service and to preserve a minimum of such service along specific corridors." [6]

Under section 401 of the RPSA, railroads operating intercity passenger trains were offered relief from their common carrier obligation to carry passengers as of

[1] H.R. Rep. No. 1580, 91st Cong., 2d Sess. 2, 3 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4735, 4736.

[2] *Id.* at 4736-37.

[3] *Id.* at 4737.

[4] *Id.* at 4736.

[5] 45 U.S.C. § 541 (1976), *amended by* Pub. L. No. 95-421, 92 Stat. 928.

[6] H.R. Rep. No. 1580, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4735.

May 1, 1971, if by that date they were able to satisfy two preconditions.[7] First, they were to execute a contract with Amtrak under which Amtrak would assume responsibility for their passenger operations ("Basic Agreement").[8] Second, they were to pay Amtrak an amount equal to "50 per centum of the fully distributed passenger service deficit of the railroad as reported to the [ICC] for the year ending December 31, 1969." [9] The five railroad parties to this case all signed Basic Agreements, made the required start-up payments, and transferred their passenger obligations to Amtrak on May 1, 1971.

The RPSA and the Basic Agreement established Amtrak's right of access to the rail lines of the signatory railroads and its right to receive services and the use of needed facilities.[10] Amtrak was totally dependent upon assistance from the railroads, for at that time it constituted little more than a skeletal corporate headquarters without the rails, equipment, facilities, or employees required to operate a nationwide rail passenger system. Amtrak has since acquired the Northeast Corridor rail lines,[11] but even today it must rely on the

[7] Railroads that chose not to avail themselves of the opportunity to discontinue passenger service under the terms of the RPSA remained subject to the obligations to provide that service imposed on common carriers by sections 10908 and 10909 of the Interstate Commerce Act, 49 U.S.C. §§ 10908-09 (1982). All railroads continued to be subject to common carrier obligations to transport freight. 49 U.S.C. § 10903 *et seq.* (1982).

[8] The Basic Agreement was attached as Exhibit B to the Railroads' Complaint. The full text appears at Court of Appeals Record ("R.") 1, and relevant portions are reprinted in the Joint Appendix ("J.A.") at 11-14.

[9] 45 U.S.C. § 561(a)(2) (1982).

[10] 45 U.S.C. § 562 (1982).

[11] These lines were acquired pursuant to the planning process carried out by the United States Railway Association ("USRA") under section 206(c)(1)(A) and (C) and section 601(d) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 716(c)(1)

railroads' tracks, facilities and operating crews for virtually all its services outside the Northeast Corridor.

The RPSA directed the Secretary of Transportation to determine the scope of Amtrak's route system, and the Secretary prescribed a system which retained only a third of the nation's then existing intercity passenger routes. Congress recognized that many railroad employees would suffer dislocation because of the transfer of service to Amtrak and the elimination of numerous trains.[12] Accordingly, it included in the RPSA a "labor protection" provision requiring the railroads to "provide fair and equitable arrangements to protect the interests of employees . . . affected by a discontinuance of intercity rail passenger service . . . ." 45 U.S.C. § 565(a). As required by subsections (a) through (e) of section 405 of the RPSA, the railroads negotiated "protective arrangements" with their unions, including a commitment of indefinite duration to provide up to six years' labor protection payments to employees disadvantaged by any future discontinuance of Amtrak's passenger service.[13] The railroads specifically agreed to preserve the "fringe benefits" of disadvantaged employees, including free transportation.[14]

(A), (C), § 791(d) (1982). *See also* USRA Final System Plan, Vol. 3, p. 823 (1975).

[12] The impact on railroad labor of the reconstitution of intercity rail passenger service under Amtrak is described in Decision No. 45 of the standing arbitration panel created to resolve disputes arising under the Basic Agreement, *Labor Protection Costs for Chair Car Porters*, National Arbitration Panel Case No. 45, R. 36, exh. 1 at 1-3.

[13] The protective arrangements, known as Appendix C-1 to the Basic Agreement, were certified by the Secretary of Labor as required by section 405(b). *See Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971) (denying motion for preliminary injunction against certification by the Secretary of Labor). Appendix C-1 is set out at R. 36, exh. 2.

[14] Article I, section 8 of Appendix C-1 states:

> 8. *FRINGE BENEFITS*—No employee of Railroad who is affected by a transaction shall be deprived during his protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of Railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

R. 36, exh. 2 at 10.

When the railroads operated passenger service for their own accounts before 1971, they established a practice of granting free and reduced-rate transportation privileges to employees, retirees, and their dependents. The railroads' pass programs varied to some extent with regard to eligibility, restrictions, controls, and reciprocal agreements with other railroads, but as a rule employees were permitted to travel free on their "home roads"—the rail lines of their employers—and in many cases they could travel at reduced rates on the lines of other railroads.[15]

When Amtrak came into being it found that "between 1,400,000 and 2,000,000 rail travel passes had been issued by the railroads and were still outstanding."[16] Consistent with its unconditional right under section 7.5 of the Basic Agreement to determine the level of free or reduced-rate privileges, "if any," that it would make available to the railroads' employees,[17] Amtrak decided to curtail existing rail pass privileges substantially. On April 23, 1971, it announced that it would extend privileges only to employees and former employees of railroads that had executed the Basic Agreement and that

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[15] *See* GAO Report, J.A. 47. The practice dates from the 1880's. *Id.*

[16] Affidavit of Roger Lewis, para. 2 ("Lewis Affidavit"), J.A. 40.

[17] Section 7.5 states: "Transportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by N.R.P.C." J.A. 14. The purpose of section 7.5 apparently was to preclude any argument that Amtrak was obliged to maintain pass privileges for the benefit of the railroads and their employees.

operated trains in the new Amtrak system. Moreover, it varied the terms of travel for employees who continued to receive passes: where they had previously been able to travel free, now they were required to pay half fare.[18]

Amtrak's decision to curtail existing pass privileges caused immediate labor difficulties for the railroads. In May 1971 certain rail unions notified the Penn Central Transportation Company of their intent to strike unless pass rights were restored.[19] On June 2, the day before the threatened strike was to begin, the United States District Court for the Eastern Division of Pennsylvania issued temporary restraining orders "restraining both the strike and the refusal to honor the passes." *Baker v. System Federation No. 1*, 331 F. Supp. 1363, 1365 (E.D. Pa. 1971). On June 18, the court granted Amtrak's motion to dismiss the temporary restraining order requiring that passes be honored on the ground that "any rights which the railroad employees have to free transportation exist only against Penn Central." *Id.*

The decision to curtail privileges and the labor unrest that it caused prompted the railroads to complain to Amtrak.[20] At the June 24, 1971 meeting of Amtrak's

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[18] Lewis Affidavit, para. 8, J.A. 40; and exh. 7, J.A. 92.

[19] The unions' demand was that Penn Central comply with Rule 51 of its collective bargaining agreement with the International Brotherhood of Electrical Workers. That provision stated:

> a. Employees will be allowed free transportation for themselves and dependent members of their families in accordance with the established practice of the company.

Baker v. System Federation No. 1, 331 F. Supp. 1363, 1364 (E.D. Pa. 1971). Provisions in collective bargaining agreements requiring the provision of free transportation under certain circumstances were not uncommon. Lewis Affidavit, exh. 7, J.A. 91.

[20] Lewis Affidavit, paras. 4-5, 7-8, J.A. 40-41.

Board of Directors, the President of Penn Central, who also sat on Amtrak's Board, stated that Amtrak's new pass policy was continuing "to result in substantial morale problems among employees of Penn Central."[21] At the next Amtrak Board meeting, Chairman Roger Lewis noted "that the railroads, and particularly Penn Central, had expressed the view that the withdrawal of free transportation privileges of employees threatened to produce severe problems for the railroads, which it was felt, would end by being harmful to Amtrak."[22]

Amtrak's Board responded by modifying its pass policy to "permit free transportation of persons who were employed by an operating railroad on April 3, 1971, while such persons are traveling on the railroad which employs them."[23] Amtrak also decided to provide half-fare system-wide transportation for employees and retirees of participating railroads and terminal companies as well as for their dependents.[24]

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[21] Minutes of Meeting of the Board of Directors, June 24, 1971, exh. 5 to Lewis Affidavit, J.A. 86.

[22] Minutes of Meeting of the Board of Directors, July 29, 1971, exh. 6 to Lewis Affidavit, J.A. 88. The problems feared by the railroads included the possibility of strikes. Lewis Affidavit, paras. 5-6, J.A. 40-41. The railroads informed Amtrak that their employees "attached great importance to pass privileges [and] considered them part of their employment privileges and as a fringe benefit and reward for service." Letter from Association of American Railroads to Amtrak Board member General Frank Besson, Jr. (June 10, 1971), J.A. 92. *See also* Lewis Affidavit, paras. 7-8, J.A. 41.

[23] Minutes of Meeting of the Board of Directors, July 29, 1971, exh. 6 to Lewis Affidavit, J.A. 89.

[24] R. 36, exh. 8 to Lewis Affidavit at 2. In revising its policy, Amtrak declared that it was not bound to furnish free or reduced-rate transportation to any person under any circumstances and that it was reserving the right to revise or terminate its policy in whole or in part at any time. *Id.* This positon squared with the statement in section 7.5 of each Basic Agreement giving Amtrak the right to determine whether passes would be made available, and if so, at what level. *See* note 17 *supra*.

This new policy still did not provide all the pass privileges that had existed before Amtrak's creation. For example, the policy denied pass privileges to employees of railroads that did not perform passenger operations for Amtrak. This limitation prompted the Norfolk and Western Railway Company to complain about the loss of pass privileges for its employees.[25] Moreover, retirees and dependents were offered reduced rates over their home roads, whereas they had previously enjoyed free home-road transportation.

The railroads persisted in attempting to persuade Amtrak to restore these additional privileges.[26] In 1972 Congress examined the matter and, over Amtrak's vigorous opposition,[27] it amended the RPSA by adding subsection 405(f) ("1972 Amendment")[28] to require Amtrak to restore free or reduced-rate transportation to all railroad employees who had these privileges when Amtrak took over rail passenger service. The 1972 Amendment required Amtrak to assure that to the maximum extent practicable railroad and terminal company employees, retirees, and their dependents[29] eligible for free or reduced-rate transportation on April 30, 1971, would be eligible to travel free or at a reduced rate on any intercity rail passenger service provided by Amtrak, on

[25] Letter from Robert B. Claytor, Norfolk, and Western Railway Company to Roger Lewis (October 7, 1971), J.A. 95-96. Letter from Roger Lewis to Robert B. Claytor (October 15, 1971), J.A. 97-98.

[26] Lewis Affidavit, paras. 4-5, 7, J.A. 40-41.

[27] *See, e.g.*, S. Rep. No. 756, 92d Cong., 2d Sess. 25-26, 33-34, 46-48 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2393, 2414-16, 2420-22.

[28] Act of June 22, 1972, Pub. L. No. 92-316, § 8, 86 Stat. 227, 230 (1972). The 1972 Amendment is set out in the Appendix to Amtrak's Jurisdictional Statement ("J.S. App.") at 43a.

[29] For convenience these various categories of pass riders are collectively referred to as "employees" or "employees and former employees" in this brief.

terms similar to those available to them on that date. 45 U.S.C. § 565(f) (1972).

In the words of the Senate Committee which reported on the legislation, "Congress [was] merely continuing pass policies which the railroads themselves developed."[30] The legislative record indicates that in enacting the 1972 Amendment, Congress was particularly concerned with protecting the expectations which the railroads had engendered in their employees. Senator Percy, co-sponsor of the initial draft of the amendment, argued in particular for restoration of travel privileges for retirees, many of whom had lost their privileges during Amtrak's first year of operation. Shortly before the Senate voted, he read into the record passages from letters by several retired railroad employees asserting that they had "earned" their travel privileges and were surprised and disappointed to be deprived of the privileges.[31] Senator Percy argued that "the particular railroads must . . . deliver on their promises of long standing."[32] Senator Church added his view that "the loss of, or reduction of, free pass privileges by railroad employees entitled to them was a breach of faith with these people."[33]

The 1972 Amendment provided that railroads were to reimburse Amtrak for costs incurred in providing free and reduced-rate travel to their employees, including the

[30] S. Rep. No. 756, 92d Cong., 2d Sess. 11 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2393, 2400. *See also* H.R. Rep. No. 905, 92d Cong., 2d Sess. 11 (1972); 118 Cong. Rec. 14,791 (1972).

[31] One such letter stated:

> Years ago when our work contracts were drawn up, one of the benefits incorporated into the agreement was free pass privileges for railroad employees . . . . My wife and I have looked forward for years to the day when I retired so that we could take advantage of this free transportation . . . .

118 Cong. Rec. 14,791 (1972).

[32] *Id.*

[33] *Id.*

costs of implementing and administering the program. Because Amtrak and the railroads could not reach an agreement on the amount of these costs, the matter was referred to the ICC. On December 20, 1972, the ICC issued a decision approving an interim reimbursement rate of $.00079 per passenger-mile—an amount which in its view represented the "minimal variable costs" Amtrak would incur in transporting pass riders.[24] This compensation was to be offset by any reduced-rate fares paid by pass riders. As a result of the offset provision, the railroads reimbursed Amtrak solely for the pass program's administrative costs.[25]

In 1979 Congress was made aware of Amtrak's view that existing reimbursement for pass privileges was too low. Congressman Florio introduced legislation that would have required the railroads to compensate Amtrak for employee pass travel at the rate of 50% of the systemwide average yield—that is, half of the average revenue received—per passenger-mile. In hearings on the legislation, Richard K. Knowlton, Senior Vice President-Law for the Santa Fe Railway, one of the Appellees in this case, maintained that the railroads were paying their "full actual costs" for Amtrak transportation of their employees and suggested that those costs were low because employees traveled on a space-available basis. Congressman Florio contended that the

[24] "Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act, As Amended" ("ICC Report"), J.A. 23, 36. On December 21, 1972, the ICC notified all parties of "certain ministerial errors" in its Report and Order. The corrected versions of the Report and Order are reprinted at J.A. 23-38; the uncorrected version of the Report appears at 347 I.C.C. 325 (1972).

[25] GAO Report, J.A. 51. Under the 1972 reimbursement scheme, the railroads would have paid Amtrak $610,000 in administrative costs for pass travel by their employees in 1979. *Id.* at 65. Amtrak would also have been eligible to receive some $120,000 for approximately 140 million miles of pass travel by their employees during 1979, but this amount would have been offset entirely by pass rider half fares. *Id.* at 46, 64.

compensation the railroads were paying was inadequate. He noted that Amtrak had not been able to earn a profit, as had been anticipated, and said he found it "somewhat difficult to accept railroad employees riding for virtually free . . . if, in fact, the taxpayers are paying $2 for every $1 of the general passenger public."[26]

Congress subsequently amended section 405(f) of the RPSA ("1979 Amendment") to require the railroads to pay more for employee pass travel than they had previously been paying, but it rejected the 50%-of-yield standard Congressman Florio proposed in favor of a 25%-of-yield standard.[27] As amended, section 405(f) required railroads to compensate Amtrak "at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile" for a two-year period ending on September 30, 1981.[28] This reimbursement was to be "in lieu of any charges for liability" or for any other costs incurred by Amtrak. Accordingly, Amtrak could no longer charge the railroads for the administrative costs of the pass program, nor could it seek to shift the costs of pass rider liability to the railroads.[29]

[26] Amtrak FY 1980 Authorization and Amtrak Route Restructuring: Hearings before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 244-46 (1979), J.A. 100.

[27] *See* H.R. Conf. Rep. No. 481, 96th Cong., 1st Sess. 33 (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 1198, 1242.

[28] Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, § 120, 93 Stat. 537, 547-48 (1979). The 1979 Amendment is set out at J.S. App. 44a.

[29] Amtrak had previously agreed, as a matter of contract, to accept personal injury liability for railroad employees traveling on passes. Until enactment of the 1979 Amendment, Amtrak's acceptance of this risk could be one of the many factors considered by the parties in their periodic negotiations to fix the overall level of compensation Amtrak should pay for railroad services provided to support passenger operations. The 1979 Amendment permanently barred Amtrak from seeking to shift pass rider liability to the railroads or citing liability as an issue in negotiations on compensation.

The purpose of the two-year limitation was to permit Congress to reconsider the matter following receipt of a study to be conducted by the General Accounting Office ("GAO"). The statute directed GAO to report back to Congress and the ICC within 180 days with recommendations for appropriate reimbursement to Amtrak, "taking into account the value of the services being provided." [40] Congress stated that the 1979 Amendment would not "preclude the Commission from ordering retroactive relief in any proceeding instituted or reopened after October 1, 1981." Pub. L. No. 96-73, § 120(a), 93 Stat. 537, 547-48.

GAO undertook a comprehensive study of the subject and issued its report ("GAO Report") on March 28, 1980. The GAO Report included thorough consideration of the costs Amtrak incurred in providing pass privileges; the benefits conferred on Amtrak, the railroads, and the pass riders by the privileges; and the value of pass travel, taking into account its space-available feature.

In GAO's view, "Amtrak's costs to provide transportation to pass riders vary greatly depending on whether fully allocated or incremental costs are considered." [41] The Report noted that the full allocation approach represented a "widely recognized transportation/economic view" and would be consistent with Amtrak's obligation

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[40] Section 120(b) of Pub. L. No. 96-73, 93 Stat. 548, states:

> (b) REPORT.—The Comptroller General shall conduct a study of the free or reduced-rate transportation provided to railroad employees by the National Railroad Passenger Corporation under section 405(f) of the Rail Passenger Service Act. Within 180 days after the effective date of this Act, the Comptroller General shall submit a report to the Congress and to the Interstate Commerce Commission setting forth recommendations regarding the appropriate means for reimbursing the Corporation for the cost of providing such transportation services, taking into account the value of the services being provided.

[41] GAO Report, J.A. 68.

to recover "as much of its costs as practicable"; [42] however, it stated that because fares based on fully allocated costs would substantially exceed fares actually being paid by regular passengers, fully allocated costs were "probably not a realistic basis to determine how much Amtrak should be reimbursed." [43] GAO noted that the fares regular passengers pay are set with reference to factors such as "competition from other transportation modes and the nature of the particular market being served." [44]

In assessing the overall benefits of the pass program, GAO found that both the railroads and their employees would profit from continuation of employee travel privileges.

> There is no question that pass riders benefit from the pass program. The railroads benefit when their employees have a higher morale and better relationship with their employers because of the passes. Amtrak may benefit, but it is uncertain how much. [45]

GAO also noted the widely held view that the railroads owed future pass benefits to their employees.

> Railroad employee union representatives—including several unions' legislative directors and two vice-presidents—told us that the pass privileges under the Rail Passenger Service Act are benefits that the railroads owe their employees. The representatives said the railroads have historically provided the benefits, and the employees earned the privileges by their years of service to the railroads. [46]

While GAO was able to identify many different types of benefits that might be conferred by the privilege, it found that "many benefits are intangible or difficult to quantify." [47]

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[42] *Id.* at 61, 63.

[43] *Id.* at 61, 68.

[44] *Id.* at 64.

[45] *Id.* at 67-68.

[46] *Id.* at 67.

[47] *Id.* at 61.

GAO stated that "the value of the service Amtrak provides pass riders is an important factor in deciding what the reimbursement rate should be." However, it "could not arrive at a definitive value of the service," [48] principally because it was "unable to quantify how the restrictions and uncertainty [occasioned by the space-available limitation] affect the value of service pass riders receive compared to full fare passengers." [49]

In conclusion, GAO stated that it "could not find adequate analytical evidence to establish whether Amtrak should be reimbursed for the value of the service it provides pass riders or for the incremental costs of providing the service. That choice is a policy decision that the Congress should make." [50] Congress made that policy choice in 1981 when it further amended section 405(f) to make the 25% compensation standard permanent ("1981 Amendment"). [51]

In response to enactment of the 1979 Amendment, Appellee Railroads filed this suit in the United States District Court for the Northern District of Illinois in December 1980. The Railroads alleged that Congress had violated their constitutional right to due process when it enacted and amended section 405(f) of the RPSA to require them to compensate Amtrak for the pass travel of their employees and former employees. They filed a Motion for Summary Judgment; in response, Amtrak filed a Cross-Motion for Summary Judgment. The United States intervened under 28 U.S.C. § 2403 and filed a Motion to Dismiss, or, in the alternative, for Summary Judgment.

On November 22, 1982, the Honorable Bernard M. Decker issued an Order and accompanying Memorandum

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[48] *Id.* at 77.

[49] *Id.* at 78. GAO found that "[o]n most trains space is available, and pass riders on those trains usually are treated the same as regular full fare passengers." *Id.*

[50] *Id.* at 80; *see also* J.A. 43, 82.

[51] Amtrak Improvement Act of 1981, Pub. L. No. 97-35, § 1184, 95 Stat. 357, 697 (1981).

Opinion granting the Motions of Amtrak and the United States. Judge Decker held that the Railroads had no contractual right to be free of all financial responsibility for their employees' pass privileges. [52] He also ruled that under the "harshest possible scrutiny" to which congressional regulation of commerce could be subjected, the pass rider provision did not violate due process. [53] Finally, he ruled that Congress had acted rationally in determining the amount of pass rider compensation due to Amtrak, and thus held that the statutory standard was constitutional as a matter of law. [54]

The Railroads appealed Judge Decker's decision to the United States Court of Appeals for the Seventh Circuit, again alleging that the reimbursement requirement impaired their contractual rights and was thus unconstitutional. On December 13, 1983, a panel of that court reversed the District Court's decision in part and affirmed it in part. The Court of Appeals agreed with Judge Decker that the Basic Agreement did not give the Railroads a contractual right to be free of all responsibility to reimburse Amtrak for employee pass privileges. [55] However, the court noted that the methodology for computing reimbursement set forth in the 1979 Amendment required the Railroads to pay amounts in excess of the incremental cost of employee pass privileges. [56] The court reasoned that since these additional sums presumably went to support Amtrak's general operations, the statute impermissibly impaired the Railroads' contractual right to be relieved of responsibility for the provision of intercity rail passenger service. [57] Amtrak appeals from that decision. [58]

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[52] J.S. App. 19a.

[53] *Id.* at 25a-26a.

[54] *Id.* at 26a-27a.

[55] *Id.* at 4a-7a.

[56] *Id.* at 8a.

[57] *Id.* at 8a-10a.

[58] On April 6, 1984, the Railroads filed a Jurisdictional Statement on Cross-Appeal in order to obtain "a broader measure of relief

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in concluding that compensation for pass travel may not exceed the incremental costs Amtrak incurs in providing that travel. Congress has the latitude to consider factors other than incremental cost in fixing charges for the provision of services, and it properly took those factors into account in enacting the 1979 and 1981 Amendments. Particularly in light of the benefit the Railroads have derived from continuation of their employees' pass privileges, the 25%-of-yield formula Congress adopted is reasonable. Moreover, the studied process Congress followed in settling on a formula confirms the reasonableness of the result it reached. Accordingly, this case presents no issue of contract impairment.

2. Even if the 1979 and 1981 Amendments could be found to impair contract rights of the Railroads created by the RPSA or the Basic Agreement, that impairment would not be so substantial as to contravene due process. No reasonable expectations were materially affected by the Amendments, and the Railroads suffered no significant, harsh or permanent diminution in the value of their contract rights.

I. IN FIXING COMPENSATION FOR RAILROAD EMPLOYEE PASS PRIVILEGES, CONGRESS IS NOT LIMITED TO INCREMENTAL COST.

The Court of Appeals invalidated the 1979 Amendment because of its determination that any compensa-

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than the Court of Appeals granted." J.S. on Cross-Appeal at 7. In particular, the Railroads maintain that their relief from "the entire responsibility for the provision of intercity rail passenger service" bars Congress from imposing on them any financial responsibility whatsoever for their employees' pass privileges. Because the Court has deferred its decision on jurisdiction of the cross-appeal, and because the arguments advanced in support of Amtrak's appeal apply with even greater force to the issues raised by the cross-appeal, the cross-appeal is addressed only in passing herein. *See* pp. 21-23 & notes 64, 83 *infra*. If the Court were to grant jurisdiction in No. 83-1633, it should summarily reject the Railroads' arguments in that case.

tion in excess of the incremental cost of providing pass privileges could not be viewed as compensation for the privileges, and thus constituted a subsidy of Amtrak's operations in violation of the Railroads' alleged contractual right to be free of any such subsidy requirement.[89] In reaching this determination, the Court of Appeals must have been operating from one of two premises. Either the court believed that the Railroads have some special right to pay no more than incremental costs for pass travel provided to their employees; or the court believed that Congress cannot, as a general proposition, require compensation for services in excess of the incremental costs of providing the services.

Neither premise is correct. The Railroads were relieved of the duty to provide passenger service at their own expense, but they received no special contractual right limiting their obligation to pay for pass privileges provided to their employees. And, as a general matter, Congress plainly has the authority to look to factors other than incremental cost in fixing compensation for services provided at its direction. Once Congress' broad discretion in this area is recognized, there is no basis for concluding that the 1979 and 1981 Amendments have the effect of requiring the Railroads to subsidize Amtrak's operations. Accordingly, even if the Railroads had a contractual right to be free of such a subsidy requirement—a point which Amtrak has strenuously denied[90]—enforcement of the Amendments would not impair that right.

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[89] The Court of Appeals stated:

> [T]he statute at issue authorizes reimbursement beyond the costs of the passes. It thereby transfers funds from the railroads to Amtrak, which funds Amtrak may in turn use to finance aspects of its operations that were once part of the railroads' entire responsibility for the provision of intercity rail passenger service.

J.S. App. 8a.

[90] *See* note 88 *infra*.

A. The Railroads Have No Right To Be Treated Differently from the General Public with Respect to Charges for Services Provided at the Direction of Congress.

Neither the RPSA nor the Basic Agreement conferred on the Railroads any special right limiting their obligation to pay Amtrak for pass privileges provided to their employees. The Railroads were relieved of their "entire responsibility for the provision of Intercity Rail Passenger Service,"[41] but that relief did not reach the issue of employee pass travel. The Railroads themselves have contended that they never had any responsibility to provide free or reduced rate transportation to employees and their families.[42] Both the District Court and the Court of Appeals correctly found that the Basic Agreement did not address the Railroads' obligation to pay for transportation services provided to their employees.[43]

Absent some particular contractual right to be relieved of financial obligations associated with employee pass privileges, the Railroads have the same rights and obligations as other members of the public. They have

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[41] 45 U.S.C. § 561 (1982), J.S. App. 40a-41a; Basic Agreement, § 2.1, J.A. 13.

[42] R. 25, Railroads' Memorandum in Support of Motion for Summary Judgment at 6, 43; R. 50, Reply Memorandum at 35.

[43] J.S. App. 4a-7a, 18a-19a. Section 7.5 of the Basic Agreement addresses five different types of "transportation privileges" and allocates costs between Amtrak and the Railroads with respect to four of them. Significantly, the pass privilege is the only one for which financial obligations are *not* allocated. J.A. 13-14.

In their cross-appeal, the Railroads continue to press the claim that relief from responsibility to provide passenger service included relief from all cost obligations with respect to their employees' pass travel. J.S. on Cross-Appeal at 8. They confuse two fundamentally different concepts: a common carrier's provision of transportation services to the public on the one hand, and an employer's payment for employee fringe benefits on the other. A pass is an employee benefit that happens to involve passenger trains, not passenger service that happens to involve railroad employees.

been relieved of their common carrier obligation to provide passenger service, but like other employers, they can be required to provide services to their employees, or pay others for providing services, where legislation requiring the services promotes a legitimate legislative end.[44] More specifically, they have no right to avoid paying appropriate consideration for services provided to their employees by Amtrak.

B. Congress Can Take into Account Considerations Other Than Incremental Cost, Such as Value Received and Public Policy, in Fixing Compensation for Services Provided at Its Direction.

Since the Railroads have no special rights with respect to compensation for pass privileges, the Court of Appeals' analysis must rest on the proposition that no person may be required to pay more than incremental costs for services provided at the direction of the government. But there is no support for this view.[45]

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[44] The obligations the Railroads have under section 405(f) are obligations imposed on railroads generally, not just on those who signed the Basic Agreement and transferred service to Amtrak. The compensation requirement was imposed on every "railroad" employing an individual who was eligible for pass privileges in April 1971. The statute is drafted to cover railroads, including state commuter agencies, that were not even in existence in 1971, if they now employ individuals who were eligible for pass travel at that time. Plainly Congress had a broader purpose in mind than altering the terms of the Basic Agreement.

[45] In the Court of Appeals, the Railroads sought to rely on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), for the proposition that statutory fees for services which substantially exceed the cost of the services are unconstitutional. Railroads' Court of Appeals Brief at 43. The decision in *Webb's* was expressly limited to "the narrow circumstances" of that case, 449 U.S. at 164, and is distinguishable from this controversy on several grounds. It involved a *double* payment for use of a judicial interpleader fund—accrued interest *plus* a fee. The Court was obviously concerned with that fact and specifically reserved judgment as to whether a

Neither the Due Process Clause, nor any other provision of the Constitution, compels exclusive reference to incremental costs, or any other specific economic approach, in determining the outside measure of compensation.[66]

To begin with, the setting of fees is an area in which Congress is entitled to considerable latitude. This Court has observed that "'[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.'" *National Association of Greeting Card Publishers v. United States Postal Service*, 103 S. Ct. 2717, 2728 (1983) quoting *Colo-*

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statute compelling forfeiture of interest only would be constitutional. *Id.* at 164-65. In addition, the Court was apparently concerned that the Florida statute went against the "usual and general rule" and that interest on a deposited interpleader fund follows the principal. *Id.* at 162. Moreover, the state advanced no reasonable basis to support the fairness of its action. *Id.* at 163.

[66] The Railroads have suggested that incremental costs are the only appropriate measure of compensation because their employees traveling on passes are, in effect, incremental passengers entitled to transportation only where space is available. Railroads' Motion to Dismiss or Affirm in No. 83-1492 at 10-11. To the extent the space-available limitation restricts their employees' right to travel—and GAO found that the restriction was not substantial, J.A. 78—that fact goes only to the value of the pass privilege. It does not logically dictate that an incremental costing methodology be employed. In any event, Congress took the space-available limitation into account when it required the Railroads to pay compensation equal to one-fourth of the price of a regular ticket on Amtrak. *See* GAO Report, J.A. 78, 80, 81.

It bears noting that incremental costing methodologies have the capacity to produce capricious economic results. If each passenger were entitled to pay an amount limited to the incremental cost of his or her own transportation, the total sum collected would surely fall short of the full cost of providing transportation for all. *See* P. Areeda & D. Turner, *Antitrust Law*, ¶ 712, at 155 (1978); *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392, 402-03 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

rado Interstate Gas Co. v. FPC, 324 U.S. 581, 589 (1945)). So long as there is a "reasonable relationship"[67] between the fee charged and the services provided, the judgment of Congress must be upheld:

> [A] . . . legislature is not obliged to arrive at exacting calculations about comparative costs and benefits before imposing a user's fee for a particular state-sponsored service. Lawmakers are not required to design fee structures with the scrupulous eye of the accountant, always matching revenues and costs.

Murillo v. Bambrick, 681 F.2d 898, 909 (3d Cir.), *cert. denied*, 459 U.S. 1017 (1982).[68]

Not only does Congress have latitude in fixing the specific level of a fee; it also has broad discretion to decide the economic theory upon which the fee will be based. For example, it can look to the full costs—that is, the direct and indirect costs—incurred in providing services.[69] Alternatively, it can look to the value of the services to the recipient.[70] Congress can consider the play of market forces.[71] And it can take into account the de-

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[67] *See* note 80 *supra*.

[68] *Accord, Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 391 (1978) (noting that the state need not "justify to the penny" charges for governmental services); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939); *National Ass'n of Greeting Card Publishers*, 607 F.2d at 401 ("[w]hile cost allocations often possess a patina of scientific precision, they remain ultimately matters more of judgment and appraisal than mathematical certainty").

[69] *Mississippi Power & Light Co. v. NRC*, 601 F.2d 223, 231-32 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *Electronic Indus. Ass'n v. FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976).

[70] *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974).

[71] *Yosemite Park and Curry Co. v. United States*, 686 F.2d 925 (Ct. Cl. 1982) (rejecting claim that charges for electricity provided concessioners in national park must be cost-based and upholding rate structure based on comparable utility charges). *See also* 39 U.S.C. § 3622(b)(5) (1982).

sirability of encouraging or discouraging particular activities.[72] Congress may employ combinations of these approaches and others as well, provided that a reasonable relationship exists between the fee and the service.

Congress' latitude to pick and choose from among these various approaches to the setting of fees is confirmed by the terms of familiar statutes of unquestionable constitutional validity. For example, under 39 U.S.C. § 3622 (1982), the rate charged for carriage of a particular class of mail is expressly not limited to incremental costs; rather, the rate is to be based on no less than nine relevant factors, including, among others, the value of the mail service provided, the need to cover "direct and indirect costs," and the available alternative means of sending and receiving mail.[73] Similarly, the Independent Office Appropriation Act ("IOAA"), 31 U.S.C. § 9701 (1982), expresses the sense of Congress that federal agencies providing services to the public should be "self-sustaining to the extent possible," [74] and authorizes the head of each federal agency to prescribe fees for such

[72] *Baldwin*, 436 U.S. at 390 (state legislature could charge fees for hunting licenses which were not "precisely fixed and more closely related to basic costs to the State" in pursuit of substantial regulatory interest and desire to preserve finite resources); *cf. FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 561-71 (1976) (license fees set at levels to discourage imports).

[73] This Court, in considering whether certain rates satisfied the requirement of 39 U.S.C. § 3622(b)(3) that each class of postage bear (1) direct and indirect costs attributable to it and (2) that portion of other Postal Service costs reasonably attributable to it, stressed that Congress had not intended to remove discretion from the ratesetting agency, but had meant to permit "consideration of all appropriate costing approaches." *National Ass'n of Greeting Card Publishers*, 103 S. Ct. at 2726-28.

[74] *See also* 43 U.S.C. § 1734(b) (1982); 30 U.S.C. § 185(*l*) (1982); *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983) (construing 43 U.S.C. § 1734 and the IOAA); *Alyeska Pipeline Service Co. v. United States*, 624 F.2d 1005, 1011-13 (Ct. Cl. 1980) (construing 30 U.S.C. § 185(*l*) and the IOAA).

services taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served and other pertinent factors.[75]

Although Congress often requires compensation for services provided at its direction in order to enable governmental agencies to be "self-sustaining," [76] it is by no means limited to pursuit of that purpose. When Congress requires that employees receive certain services and that employers make some payment for those services, it may determine the appropriate size of the payment with other purposes in mind, such as allocating costs to the employer who caused the problem requiring legislative attention,[77] requiring the employer to pay for the benefit

[75] This Court, in construing an earlier but not dissimilar version of the IOAA, held that of these factors "value to the recipient" is the most significant. *See National Cable Television Ass'n*, 415 U.S. at 342-43. In *National Cable*, the Court interpreted "value to the recipient" to be "the measure of the authorized fee," *id.*, thus limiting an administrative agency's authority to look to "public policy or interest served, and other pertinent facts." The Court adopted this narrow construction because it reasoned that otherwise the statute would raise "constitutional problems" by allowing an administrative agency to exercise Congress' power of taxation. This reasoning does not imply any similar limit on the authority of *Congress* to fix fees; indeed, in a dissenting opinion, Justice Marshall stated, "I have no doubt—and I suspect that a majority of the Court would agree—that Congress could constitutionally authorize the Commission to impose annual charges of the sort involved here." *Id.* at 354.

[76] 31 U.S.C. § 9701 (1982).

[77] *Atchison, Topeka & Santa Fe Ry. v. Public Utils. Comm'n*, 346 U.S. 346, 353 (1953). In rejecting the railroads' claim that they should be required to pay for the costs of highway-railroad grade separations only to the extent of the particular benefit they derived, the Court noted that the presence of "tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience." The Court continued:

> Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.

Id.

it derives from the services,[78] or other goals of public policy or equity.

Failing to put a precise economic constraint such as "incremental costs" on the charges Congress may impose does not, as the Railroads have suggested, open the door to unlimited assessments and the confiscation of private property.[79] In numerous cases involving the alleged impairment of private property interests through legislative action, the Court has determined constitutionality according to a broader formulation, such as the fairness or reasonableness of the challenged action.[80] The

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[78] In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976), the Court stated that it was "for Congress to choose" whether "to impose [liability for miners' black lung disabilities] solely on those early operators whose profits may have been increased at the expense of their employees' health."

[79] In their Motion to Dismiss or Affirm in No. 83-1492, at 11, the Railroads state:

> The 'fair value of services' test mentioned by Amtrak (Jur. St. at 9) does not adequately protect the Railroads against impairment of their contractual release where the 'fair value' is determined unilaterally by Congress, and where the services being 'valued' are not even being given to the Railroads.

Both concerns are wide of the mark. Congress commonly makes economic judgments far more complicated than those involved here, and its broad latitude to make those judgments is well established. *E.g., Turner Elkhorn*, 428 U.S. at 15-19. And while the pass travel itself is not being provided to the Railroads, the benefits they have derived from continuation of pass privileges are obvious, and are confirmed by the Railroads' persistent efforts to preserve the privileges in 1971. *See* pp. 8-10 *supra*.

[80] For example, in considering the validity of assessments requiring railroads to pay for grade separation, where the "Court has consistently held that . . . the cost of such improvements *may be* allocated all to the railroads," the Court has pointed out that "[t]here is the proper limitation that such allocation of costs must be fair and reasonable." *Santa Fe*, 346 U.S. at 352 (emphasis in original). *See also Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *Clark*, 306 U.S. at 599 ("If the fees charged do not appear to be

Court has rightly determined not to draw a rigid boundary, and has instead considered the reasonableness of each assessment according to its unique facts. The Court of Appeals' decision to inject a particular economic theory into the Due Process Clause cannot be sustained.

C. In Adopting the 25%-Of-Yield Formula, Congress Properly Took into Account Factors Unrelated to Incremental Cost.

On the facts of this case, Congress plainly acted reasonably in fixing the fees the Railroads should pay for their employees' pass privileges. The Railroads originated pass privileges and pressed Amtrak hard for their continuation in 1971, warning of serious labor problems if they were curtailed.[81] The sums the Railroads pay for the privilege represent approximately one-fourth of the price of an Amtrak ticket and a far smaller fraction of the true cost of transporting a passenger on Amtrak. The pass privilege confers benefits on the Railroads to the extent of improved morale, labor peace, and a more valuable employee compensation package. At the same time, permitting railroad employees to travel free or at reduced rates has the effect to some degree of diminishing Amtrak's regular ridership and diluting its revenues.[82] When Congress fixed the formula for prospec-

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manifestly disproportionate to the services rendered, we cannot say from our own knowledge or experience that they are excessive.").

[81] *See* text at notes 20-26 *supra*. In enacting the 1972 Amendment, Congress stated that it was justified in charging the Railroads for their employees' pass privileges because it was "merely continuing pass policies which the railroads themselves developed . . . ." *See* text at note 30 *supra*.

[82] GAO noted that allowing railroad employees to travel free or at greatly reduced rates would effectively decrease the number of passengers who were traveling at normal fares, thus adversely affecting Amtrak's ridership and diluting its yield. In other words, many of the railroad employees whom Congress permitted to travel free or at half fare might well have been willing, in the absence of

tive payments in 1979, it could also take into account the fact that compensation had been minimal during the period from 1972 to 1979, when initial labor difficulties were encountered, more pass riders were traveling, and the Railroads had thus derived even greater benefits from continuation of the privilege.

The legislative record shows that Congress had these considerations before it when it selected an interim formula in 1979 and made the formula permanent in 1981. Congress was fully justified in looking not just to incremental cost, but also to facts such as fully allocated cost, benefit, equity and public policy.[83]

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the pass privilege, or in response to a lesser discount, to pay Amtrak's usual fare. The GAO identified this issue as one "worthy of further consideration."

> Amtrak may benefit [from the pass privilege], but it is uncertain how much. The major questions are (1) how many pass riders would ride Amtrak as regular passengers and pay full fare if they did not have passes and (2) would other passengers be found who are willing to ride at a lesser discount.

GAO Report, J.A. 68.

The Court of Appeals' decision did not take this "dilution" effect into account. The court erroneously reasoned that "passholders occupy seats that would otherwise be empty." J.S. App. 10a.

[83] Given the Railroads' startling assertion in their cross-appeal that Congress cannot require them to pay *anything* for their employees' pass privileges, a review of basic principles is in order. Congress has the authority to require employers to make expenditures for the benefit of their employees in pursuit of a legitimate public purpose, such as the preservation of labor peace, *United States v. Lowden*, 308 U.S. 225 (1939), or the protection of employee welfare, *Turner Elkhorn*, 428 U.S. 1 (1976). This Court has consistently declined to second-guess the wisdom of such legislation. *Id.* at 18-19.

D. The Process Congress Followed in Fixing Compensation Confirms the Reasonableness of the Result It Reached.

Not only was the formula Congress selected fair on its own terms; the process Congress followed in arriving at that formula reaffirms the reasonableness of its result.

In 1972, Congress asked the ICC to establish a compensation standard, and the ICC did so. The rate the ICC prescribed required the Railroads to pay Amtrak $2.49 for an employee's journey from New York City to Los Angeles.[84] By 1979, Congress had concluded that an increase in compensation was warranted. Congress considered adopting a 50%-of-yield formula, then cut that figure in half in the 1979 Amendment,[85] and directed GAO to study the matter fully and to prepare a report recommending an appropriate basis for reimbursement. To maintain flexibility in case GAO's analysis showed that a different standard was warranted, Congress made the 1979 standard effective only on an interim basis and subject to retroactive redetermination by the ICC after October 1, 1981.

GAO then studied the matter and advised that "the traditional half fare" would be an appropriate "value to be used" if Congress selected value-based rather than cost-based reimbursement.[86] Nevertheless Congress again rejected the 50%-of-yield approach in favor of a 25%-of-yield standard in making the compensation provision permanent in 1981.

Congress thus had before it the analyses of two independent agencies; it had many years' experience with the privilege; and it specifically considered formulas

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[84] This figure is the product of the ICC's rate of $.00079 per passenger mile and the distance of 3,152 rail miles.

[85] *See* note 37 *supra*.

[86] GAO Report, J.A. 81.

based on both value and cost. For a court to conclude that Congress was not constitutionally permitted to adopt a reasonable compromise between the value and cost approaches would be a singular intrusion of the judiciary into "a policy decision that the Congress should make." [87] If Congress must undertake more careful deliberation, or use a more stringent test, to make economic judgments like those involved here, then much legislation is in peril.

II. EVEN IF THE RAILROADS HAD A CONTRACTUAL RIGHT TO BE FREE OF ALL OBLIGATIONS ASSOCIATED WITH INTERCITY RAIL PASSENGER SERVICE, THAT RIGHT HAS NOT BEEN IMPAIRED IN A MANNER PROSCRIBED BY THE CONSTITUTION.

There are substantial reasons for concluding, as the District Court did, that the Railroads have no contractual right to be free of any and all obligations that might involve financial contributions to intercity rail passenger service.[88] But even if the Railroads had such a right,

[87] *Id.*

[88] Contrary to the Railroads' arguments before the Court of Appeals, the RPSA should not be construed as a statutory contract. There is a strong presumption against construing statutory language to create enforceable private contracts. *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937). Only where "the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State" will the legislature be held to have bound itself in contract. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.14 (1977). Here Congress evinced no such intent; moreover, in section 301 of the RPSA it expressly reserved its right "to repeal, alter or amend" the statute granting relief. 45 U.S.C. § 541. The District Court's determination that the RPSA should not be construed as a contract appears at J.S. App. 17a.

In addition, there is no basis for the Railroads' claim that the Basic Agreement itself should be construed as a binding commitment of the United States that limits Congress' future ability to adopt reasonable regulations of commerce. The RPSA established Amtrak as an independent entity, neither an agency nor an establishment of the United States, 45 U.S.C. § 541, and as the Railroads have acknowledged, even if Amtrak had itself intended to relieve the Railroads of all future statutory obligations, it did not have the power to do so. Railroads' Motion to Dismiss or Affirm in No. 83-1492 at 8.

and even if the right was in some respect diminished by enforcement of the 1979 and 1981 Amendments, nevertheless the right has not been impaired in a manner proscribed by the Due Process Clause of the Fifth Amendment.

The Due Process Clause does not forbid all enactments that have the effect of impairing contractual obligations. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709, 2719-20 (1984). Even the categorical prohibition of the Contract Clause against state impairments of contract is not to be interpreted literally. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934). The pertinent inquiry in assessing the constitutionality of a statute under either clause is whether the statute *substantially* impairs contractual rights—that is, whether an essential element of the contract at issue has been damaged in a material way. If impairment is found to be insubstantial under Contract Clause analysis—the context in which the substantiality inquiry has most often been undertaken—it follows *a fortiori* that impairment should be found insubstantial under the "less searching" standards of the Due Process Clause.[89]

[89] The Court's decison in *Gray* indicates that where federal legislation is involved, the inquiry may be ended once it appears that Congress has not acted in a harsh or arbitrary manner. 104 S. Ct. at 2717-18. Due Process Clause analysis and Contract Clause analysis are of course related, in the sense that a finding of no substantial impairment will validate a statute under either approach. The

In determining whether substantial impairment has occurred, the Court's recent decisions have focused on two basic issues: the reliance interest of the party affected by the alleged impairment, and the economic impact of the challenged legislative action. Reliance has tended to be the predominant issue, since it goes to the central purpose of the law of contract.[90] The Court has analyzed reliance from several different perspectives: was it reasonable—that is, did the challenged legislation deal with an area already subject to regulation, where further legislative action should have been anticipated;[91] does it appear that the affected party *actually* relied on the impaired aspect of his contract rights;[92] and a related in-

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analysis differs where impairment cannot be dismissed as insubstantial: under the Contract Clause, state legislation may have to clear a relatively high hurdle, such as pursuit of an important public purpose, *see Spannaus*, 438 U.S. at 248-50; *U.S. Trust*, 431 U.S. at 29, while federal legislation need only constitute a reasonable means to accomplish a legitimate end in order to satisfy due process. Since "substantiality" is a threshold issue under both tests, Contract Clause decisions that address it are relevant to this case. But it bears emphasis that even if the alleged impairment caused by the 1979 and 1981 Amendments could not be deemed insubstantial, the fact that Congress has acted reasonably, rather than harshly or arbitrarily, would be a wholly sufficient basis for upholding the validity of the Amendments. *Gray*, 104 S. Ct. at 2717-18.

[90] In *Spannaus*, the Court stated:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

438 U.S. at 245.

[91] *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 103 S. Ct. 697, 705 (1983); *Spannaus*, 438 U.S. at 242, n.13; *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940).

[92] *Spannaus*, 438 U.S. at 246; *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965).

quiry, did the challenged legislation address unanticipated circumstances, so as to keep the parties in the positions they should have expected to occupy.[93] The inquiry concerning economic impact has also been multifaceted, going to the magnitude of the alleged impairment, the timing of its occurrence, and its duration.[94] As is shown below, any impairment caused by the 1979 and 1981 Amendments must be adjudged insubstantial when measured by each of these criteria.

A. Given the Scope of Federal Regulation of Rail Passenger Service and Railroad Labor Relations, the 1979 Amendment Did Not Impair Any Reasonable Expectations.

In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, this Court made clear that "'[i]n determining the extent of the impairment,'" it would "'consider whether the industry the complaining party has entered has been regulated in the past.'" 103 S. Ct. 697, 705 (1983) (quoting *Spannaus*, 458 U.S. at 242, n.13, and *Veix*, 310 U.S. at 38). A finding of substantial impairment is more likely where the challenged legislation "[does] not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State." *Spannaus*, 438 U.S. at 250. On the other hand, where the legislation involves an area previously regulated by the State, the affected party is less entitled to assume that his contractual rights will never be touched by future legislation. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

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[93] *Energy Reserves Group*, 103 S. Ct. at 705; *U.S. Trust*, 431 U.S. at 31; *El Paso*, 379 U.S. at 515.

[94] *Spannaus*, 438 U.S. at 246-47 (citing *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978)).

Since the enactment of the Interstate Commerce Act in 1887, Congress has exercised broad authority to regulate virtually every aspect of railroad operations. In particular, it has enacted legislation governing the issuance and terms of pass privileges for railroad employees, *see, e.g., Francis v. Southern Pacific Co.*, 333 U.S. 445, 449-50 (1948). And it has legislated to regulate employment relations in the railroad industry, *e.g., Baltimore & Ohio Railroad v. ICC*, 221 U.S. 612, 618-19 (1911) (Hours of Service Act); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956) (Railway Labor Act); *United States v. Lowden*, 308 U.S. 225, 233 (1939) (labor protection). In *Lowden* the Court stated that Congress has unquestioned authority to regulate railroads in order to avoid labor strife, promote employee morale, and preserve the "efficient operation of the industry itself." The Court continued:

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

308 U.S. at 235-36.

Because railroads are regulated, persons investing in them have " 'assumed the risk that . . . the interests of the public would be considered as well as theirs' " and that their private profit-making interests may sometimes be subordinated to the public interest. *New Haven Inclusion Cases*, 399 U.S. 392, 492 (1970) (quoting *Reconstruction Finance Corp. v. Denver & Rio Grande Western Railroad*, 328 U.S. 495, 535-36 (1946)). Investors must recognize that a railroad may be forced to pay

for improvements from which it derives little or no benefit, *Santa Fe*, 346 U.S. at 353. A railroad may even be required to add a new train and operate it at a loss in order to serve the convenience of the traveling public. *Atlantic Coast Line Railroad v. North Carolina Corporation Commission*, 206 U.S. 1 (1907).[95]

In this regulated environment, any expectation of the Appellee Railroads that they would never be required to protect the interests of their employees from dislocation occasioned by the transfer of passenger service to Amtrak would have been patently unreasonable. Moreover, there is no basis for believing that the Railroads actually had any such expectation. At no point in this litigation have they stated that they would not have signed the Basic Agreements if they had known that they would eventually be required to pay Amtrak for employee pass privileges at the current level of compensation. They have attempted to suggest as much, but their artful phrasing—each has said it "would not have entered into the Basic Agreement if it had known that it would continue to be responsible to reimburse Amtrak for providing intercity rail passenger service"[96]—decidely stops short of a declaration that the requirement of section 405(f) would have made the difference. Because the Railroads made no effort to address compensa-

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[95] The *Atlantic Coast Line* decision indicated that the outer limit on Congress' authority to require such money-losing actions in pursuit of the public good is the railroad's overall ability to earn a reasonable profit. 206 U.S. at 25. *See Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399 (1920); *Bullock v. Florida ex rel. R.R. Comm'n*, 254 U.S. 513 (1921); *Railroad Comm'n v. Eastern Texas R.R.*, 264 U.S. 79 (1924); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122-23 (1974).

[96] R. 27, Affidavit of F. S. Farrell, p. 2 (attached to Railroads' Motion for Summary Judgment). Nearly identical language appears in the Affidavits of D. G. Ruegg, ¶ 6 and W. F. Howes, Jr., ¶ 9, also attached to the Motion.

tion for pass travel in the Basic Agreement, and because of the magnitude of the losses they were attempting to escape, any representation to that effect would be difficult to credit.[97]

The terms of the RPSA itself also undercut the Railroads' claim that they believed they were receiving a perpetual release from all obligations with respect to Amtrak's service. The statute imposes on them duties related to passenger service that involve ongoing operational and financial responsibility. Most obviously, it was clear at the outset that under subsections (a) through (c) of section 405, they would for the indefinite future bear substantial financial obligations to their employees involved in Amtrak operations.[98] The proposition that the RPSA fixed for all time the limits of the Railroads' obligation to passenger service is simply not correct. The Railroads' cost obligations with respect to passenger service were not frozen—indeed, they were not even determinable—as of 1971.[99]

Of further significance on the issue of reliance are this Court's rulings that where the legislature curtails a

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[97] In *El Paso*, this Court relied on similar factors in concluding that no substantial impairment of contract rights had occurred:

> [The altered term] was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking. . . . We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of [that term] . . . , or that he interpreted that right to be of everlasting effect.

379 U.S. at 514.

[98] *See* text at notes 13-14 *supra*.

[99] In addition to section 405(f), provisions enacted since 1971 have imposed further burdens related to passenger service. For example, under section 402(e) the Railroads are obliged to give Amtrak priority access to their rail lines except in emergency circumstances. And under section 402(f) they may be required to operate passenger trains at faster speeds than freight trains. 45 U.S.C. § 562(e), (f).

party's rights under a contract to the extent of denying that party the opportunity to reap unintended benefits, no substantial impairment occurs. "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an objective of a contract." *El Paso*, 379 U.S. at 515. *See also Energy Reserves Group*, 103 S. Ct. at 705. If limiting a party to foreseeable gains does not violate the constraints of the Contract Clause, even more clearly it does not cause substantial impairment under the "less searching" standards of the Due Process Clause.[100]

Under this principle the Railroads can show no substantial impairment, for the legislative record demonstrates that the 1979 Amendment was designed in large measure to address benefits and inequities created by the 1972 Amendment and thus not contemplated when the alleged bargain was struck. In contravention of the express terms of the Basic Agreement, Congress in 1972 compelled Amtrak to provide pass privileges as a benefit to the Railroads and their employees.[101] Amtrak proved not to be a profitable enterprise,[102] so that substantial federal subsidies were required to keep its trains operat-

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[100] *Gray*, 104 S. Ct. at 2720, discussed at note 89 *supra*.

[101] *See* note 17 *supra*. The Court of Appeals completely overlooked the fact that while the Railroads had a new, extra-contractual compensation obligation imposed on them, they also received a new, extra-contractual benefit as a result of the 1972 Amendment. The court stated that "[t]o avoid being in breach, Amtrak would ordinarily have to furnish additional consideration for its modification of the basic agreement." J.S. App. 9a.

[102] As originally enacted, section 301 of the RPSA stated that "[t]he Corporation shall be a for profit corporation . . . ." In 1978, in recognition that Amtrak would not be profitable in the foreseeable future, Congress amended this language to provide that Amtrak was to be "operated and managed as a for profit corporation . . . ." Pub. L. No. 95-421, 92 Stat. 928. The House Report on the legislation stated that "[w]hen Congress passed the [RPSA],

ing, and at least indirectly, to permit travel by each passenger, including pass riders.[103] Congress determined that the ICC's ruling on incremental cost compensation was not producing adequate payments to Amtrak for pass travel, and GAO subsequently noted that offering the pass privilege would adversely affect Amtrak's fare-paying ridership.[104]

The 1979 and 1981 Amendments were an effort to deal with this predicament. Viewed in this context, Congress' action does not constitute a substantial denial of the contracting parties' original expectations; rather, it represents an effort to adjust the equities in light of changed circumstances. *See El Paso*, 379 U.S. at 515.

Had the Railroads chosen to pursue their claim on a "takings" theory—an argument they advanced and promptly abandoned in the District Court[105]—the ab-

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it fully expected the establishment of a national passenger train system which would eventually operate on a for-profit basis." The Report stated that the change was being made "to conform the law to reality . . . ." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 6, 7, 15 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2313, 2314, 2323.

[103] It was this fact in particular that Congressman Florio stressed as his rationale for raising the level of compensation paid by the railroads in 1979. *See* text at note 36 *supra* (citing Amtrak FY 1980 Authorization and Amtrak Route Restructuring: Hearings before the Subcommittee on Transportation and Commerce, 96th Cong., 1st Sess. 243-46 (1979), J.A. 99). *See also* Senate Report on the Amtrak Improvement Act of 1979, S. Rep. No. 96-183, 96th Cong., 1st Sess. 7 (1979) ("the Federal Government pays for approximately two-thirds of the cost of each Amtrak ticket").

[104] The GAO Report noted that Congress had "expressed concern that the ICC rate did not adequately reimburse Amtrak. For much of the pass rider travel, Amtrak was not reimbursed at all for the transportation." J.A. 64. On the "dilution" effect of pass travel, *see* note 82 *supra*.

[105] In their Reply Memorandum filed with the District Court, the Railroads asserted that they "undoubtedly *could* have sued the

sence of any serious reliance would have been fatal in that context as well. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), this Court identified as a principal factor in determining the existence of a compensable taking "the extent to which the regulation has interfered with distinct investment-backed expectations. . . ." The Railroads cannot show the destruction of any serious expectations as a result of the compensation requirement.

In sum, viewed from any angle, the 1979 Amendment does not appear to have impaired any genuine reliance interests of the Railroads.

B. The Impact of the 1979 Amendment on the Railroads Is Not Harsh or Prolonged, and Thus Does Not Constitute a Substantial Impairment.

The Railroads have contended, and the Court of Appeals has ruled, that "[t]he size of the sums exacted . . . under the 1979 Amendment, precludes any contention that it is merely a minimal alteration of the basic agree-

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United States, alleging . . . a taking of their property," but stressed that "they [had] not done so" and stated it was "simply inaccurate to force this case into the mold of an eminent domain proceeding." R. 50, Plaintiffs' Reply Memorandum in Support of their Motion for Summary Judgment at 12 (emphasis in original). Presumably the Railroads chose not to pursue a takings theory out of recognition that the availability of a Tucker Act remedy would bar any declaration that the RPSA was unconstitutional or any effort to enjoin its enforcement. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981); *Regional Rail Reorganization Act Cases*, 419 U.S. at 126. At most, a takings claim would have entitled the Railroads to present evidence to the United States Court of Claims to show *inter alia* the extent to which the statute had made them worse off—a difficult showing for them to make even if they had suffered some impairment of contractual rights. Moreover, since there is no constitutional basis for finding that the required compensation represents anything other than a reasonable fee for services provided, as is shown in section I above, there is no support for the argument that any taking has occurred.

ment."[106] This conclusion betrays a basic misapprehension of the "substantial impairment" inquiry. The question is not whether the effect on a contracting party's interests is large in an absolute sense, although that factor may be relevant. Instead, the central question is whether the net impairment is significant when measured against the value of the total bundle of rights the contracting party received. Judged by this standard, the Railroads cannot demonstrate any harsh or substantial diminution in the total value of their contract rights.

The best gauge of the value of those rights is the magnitude of the annual losses associated with passenger service which the Railroads were incurring in 1970. By their own calculations, their 1969 losses were considerable: the Santa Fe lost $42 million; the Union Pacific, $37.5 million; the C&O/B&O, $19 million; and the Burlington Northern, $67 million.[107] The RPSA offered relief from these losses; on the other hand, railroads that opted not to transfer service to Amtrak under section 401 were required to continue providing passenger service, and thus incurring these losses, for at least four years.[108]

To test for substantial contract impairment, these losses may be contrasted with the sums paid to Amtrak for employee pass privileges. In fiscal year 1981, those amounts were: Santa Fe, $567,000; Union Pacific, $411,000; C&O/B&O, $144,000; and Burlington Northern, $669,000.[109] Taking into account 12 years' inflation, the Railroads' annual payment for pass privileges represents a mere fraction of a percent of the annual loss they avoided when they transferred passenger service to Amtrak in 1971. Moreover, as the GAO Report noted, the Railroads received direct benefits from the provision of the pass privilege, such as improved employee morale and employment relations. Accordingly, it is far from clear that the Railroads suffered any net loss as a result of congressional action concerning the pass privilege; and if they did, it was plainly a minimal impairment of the total value of their alleged contract rights.

Just as the magnitude of the alleged impairment was not substantial, neither were the Railroads confronted with a sudden or prolonged disruption of their original expectations. The Railroads did not one day find themselves confronted with the immediate threat of insolvency, like the employer in *Spannaus* who, upon the act of terminating a pension plan or closing an office, faced "unexpected liability in potentially disabling amounts." 438 U.S. at 247. Instead, in accord with the incidence of pass travel by their employees and former employees, the Railroads are obliged to pay a stated amount for each individual trip.

Moreover, unlike the situation in *Spannaus*, the alleged impairment here is not permanent. Section 405(f) of the RPSA applies only to railroad employees and retirees "eligible to receive free or reduced-rate transportation by railroad *on April 30, 1971* . . . ." 45 U.S.C. § 565(f) (emphasis added). In other words, the statute guarantees pass privileges only to employees whom the railroads

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[106] J.S. App. 8a n.6.

[107] Railroads' Court of Appeals Brief at 4.

[108] Before enactment of the RPSA, a railroad seeking to be relieved of its common carrier obligation to operate a passenger train had to obtain ICC authorization in order to discontinue service. Under section 404 of the RPSA, railroads that failed to sign contracts to transfer service to Amtrak by May 1, 1971, were prohibited from seeking the ICC's permission to "discontinue any passenger train whatsoever prior to January 1, 1975 . . . ." 45 U.S.C. § 564(a) (1982).

[109] These amounts were presented to the District Court at oral argument but are not reflected in the formal record. The amounts shown in the Railroads' affidavits may be annualized to show approximately the same sums. *See* Railroads' Court of Appeals Brief at 10 n.9; R. 27, Affidavits.

hired before the transfer of passenger service to Amtrak. As a consequence of this limitation, the pool of employees for whose pass travel Amtrak is compensated is shrinking dramatically. When the 1972 Amendment was enacted, there were some 2.83 million individuals eligible for statutory pass privileges; by December 1979, that number had diminished to 1.05 million.[110] GAO attributed this decline principally to the deaths of employees and retirees and the maturation of their children beyond "dependent" status.[111] The decline will inevitably continue, to a point in the future where the railroads no longer have any compensation obligation at all.

The "impact" inquiry, like the "reliance" inquiry, is informed by analogy to principles articulated by this Court in construing the Just Compensation Clause of the Fifth Amendment. The Court has regarded relative economic impact as a prime factor in determining whether a compensable taking has occurred. *See Penn Central Transportation Co.*, 438 U.S. at 124. Again, it appears that the Railroads would have no better chance of establishing that a taking has occurred than they have in showing that their contract rights have been substantially impaired.

Last term this Court stated that the question whether federal legislation has had an impermissibly harsh or oppressive effect on contract rights "does not differ from" the traditional means-ends test of rationality. *Gray*, 104 S. Ct. at 2720. In rejecting the notion that the restraints of the Due Process Clause are coextensive with the restraints imposed on the states by the Contract Clause, Justice Brennan stated for a unanimous Court:

> [I]t is suggested that we apply constitutional principles that have been developed under the Contract Clause . . . when reviewing this federal legislation

[110] GAO Report, J.A. 56.

[111] *Id.* at 58.

> . . . . We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts . . . . Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses . . . . And, although we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh and oppressive,'" . . . that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*.

104 S. Ct. at 2719-20. (citations and footnote omitted).

The Court's pronouncement has significant implications for this case. Contrary to the Railroads' contentions, the Due Process Clause does not require "strict scrutiny" of federal legislation that has the effect of impairing contractual obligations.[112] The absence of

[112] *See* Railroads' Court of Appeals Brief at 17.

In addition to their claim that federal impairments of contract require scrutiny no less demanding than that accorded state impairments, the Railroads have advanced a second basis for invoking a strict "necessity" standard of review: the argument that the United States has impaired its own obligations. *Id.* This contention too should be rejected.

There is no support for the proposition that the constitutionality of legislation impairing non-financial obligations is to be tested by a strict "necessity" test. *U.S. Trust* establishes a rule for a narrow subset of government contractual undertakings: where the government borrows money from a private party, its pledge to repay may not be broken without some compelling showing of legislative need. 428 U.S. at 25-26, 29. *See Energy Reserves Group*, 103 S. Ct. at 705 n.14 (a state "cannot simply walk away from its financial obligations," and will be held "to its contractual obligations when it enters financial or other markets"). The rule plainly does not apply to this case. Here Congress has not struck a *financial* bargain; it has acted in its sovereign capacity as regulator, rather than as an obligor.

harsh, sudden or oppressive consequences for the Railroads not only supports the conclusion that no substantial impairment has occurred; in addition, it tends to show that Congress has acted reasonably and thus consistently with the requirements of the Due Process Clause. For this reason, the Railroads' challenge should be rejected.[113]

CONCLUSION

For the reasons set forth above, the Court of Appeals' holding that the 1979 Amendment is unenforceable should be reversed.

Respectfully submitted,

Of Counsel:
WILLIAM R. PERLIK
DAVID R. JOHNSON
ANDREA TIMKO SALLET
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
JARED I. ROBERTS
Associate General Counsel
NATIONAL RAILROAD
PASSENGER CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967
Attorneys for Appellant

* Counsel of Record

[113] *See also Hodel*, 452 U.S. at 276-77; *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 558-59 (1937).

JOINT APPENDIX

Nos. 83-1492 and 83-1633

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL RAILROAD PASSENGER CORPORATION,
Appellant,

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellees.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Appellee.

On Appeals from the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

PAUL F. MICKEY, JR.*
Executive Vice President
Law and Public Affairs
National Railroad Passenger Corporation
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-2967
Counsel for Appellant in 83-1492 and for Appellee in 83-1633

HOWARD J. TRIENENS
GEORGE A. PLATZ*
THOMAS W. MERRILL
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Counsel for Appellees in 83-1492 and for Appellants in 83-1633

* Counsel of Record

APPEAL DOCKETED MARCH 9, 1984—No. 83-1492
APPEAL DOCKETED APRIL 6, 1984—No. 83-1633
PROBABLE JURISDICTION NOTED IN No. 83-1492 AND POSTPONED IN No. 83-1633 ON OCTOBER 1, 1984

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DATE	PROCEEDINGS
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	No. 80-C-6749
Dec. 19, 1980	Complaint and Summons
Feb. 9, 1981	Answer
Sep. 9, 1981	Plaintiffs' Motion for Summary Judgment
Oct. 19, 1981	Notice/Motion to Intervene of the United States
Oct. 27, 1981	Order Granting Motion of the United States to Intervene as a Defendant
Nov. 5, 1981	Defendant National Railroad Passenger Corporation's Cross-Motion for Summary Judgment
Nov. 20, 1981	Intervenor—Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment
Jan. 12, 1982	First Amendment to Complaint
Nov. 22, 1982	Memorandum Opinion and Order granting Defendant's and Intervenor—Defendant's Cross-Motions for Summary Judgment
Dec. 20, 1982	Notice of Appeal of Plaintiffs
	UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
	No. 82-3057
Dec. 13, 1983	Memorandum Opinion and Order
Jan. 10, 1984	Notice of Appeal of National Railroad Passenger Corporation
Jan. 12, 1984	Notice of Appeal of the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80-C-6749

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Plaintiffs,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant.

COMPLAINT

Plaintiffs The Atchison, Topeka, and Santa Fe Railway Company ("ATSF"), Burlington Northern Inc. ("BN"), Chesapeake and Ohio Railway Company ("C&O"), Baltimore and Ohio Railroad Company ("B&O"), and Union Pacific Railroad Company ("UP") (collectively "Railroad Plaintiffs"), by their attorneys, hereby complain of defendant National Railroad Passenger Corporation ("Amtrak") as follows:

COUNT I

1. Plaintiff ATSF is a Delaware corporation with its principal place of business in Topeka, Kansas and is engaged in the business of operating a railroad in Chicago, Illinois and in various areas of the United States west of Chicago, Illinois.

2. Defendant Amtrak is a corporation organized under the laws of the United States and of the District of Co-

lumbia with its headquarters in Washington, D.C. Amtrak is and has since May 1, 1971 been engaged in the business of offering railroad passenger transportation services throughout the United States, including Chicago, Illinois, and contracting with railroads such as Railroad Plaintiffs for the use of their track, facilities and other services to provide such passenger transportation services.

3. The claims asserted herein arise under 28 U.S.C. § 2201, 45 U.S.C. § 561, 45 U.S.C. § 562, 45 U.S.C. § 565 (f), the Fifth Amendment to the United States Constitution, and under the law of contracts. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, and 28 U.S.C. § 1337. The amount in controversy exceeds $10,000, exclusive of interest and costs.

4. On and before April 30, 1971, ATSF was engaged in the business of offering and providing railroad passenger transportation services. Such services were offered by ATSF as a common carrier under the Interstate Commerce Act, and its right to withdraw from such passenger transportation business was restricted by such Act. As a part of its passenger transportation business, ATSF offered free or reduced-rate transportation privileges over its own lines to its then present and retired employees and their dependents in accordance with the policy set forth in Exhibit A hereto. Such free or reduced-rate transportation privileges were not required to be provided pursuant to any contract between ATSF and its employees. ATSF did not, as of April 30, 1971, offer to its then present and retired employees or their dependents free or reduced-rate transportation privileges over lines of other railroads.

5. In 1970 the National Rail Passenger Service Act (the "Act"), 45 U.S.C. § 501, *et seq.*, was enacted. Section 401 of the Act, 45 U.S.C. § 561, authorized Amtrak to enter into contracts with railroads relieving them of

their entire responsibility for the provision of intercity rail passenger service. ATSF entered into such a contract with Amtrak, effective April 16, 1971, which contract expressly provided, in paragraph 2.1, that ATSF was relieved "of its entire responsibility for the provision of Intercity Rail Passenger Service" from and after May 1, 1971. A copy of such contract (the "Basic Agreement") is attached hereto as Exhibit B. Under the Basic Agreement and the applicable provisions of the Act, ATSF was required to pay as consideration for being relieved of responsibility to provide intercity rail passenger service an amount equal to 50% of ATSF's fully distributed passenger service deficit for the year ending December 31, 1969. ATSF has in fact paid such amount, which totalled $21,053,773. In accordance with the Basic Agreement and the Act, ATSF on May 1, 1971 ceased offering intercity rail passenger service, including free or reduced-rate passenger service to its present and retired employees and their dependents.

6. Under the provisions of the Act, Amtrak undertook to offer intercity rail passenger services subsequent to April 30, 1971 over certain railroad lines, including the lines of Railroad Plaintiffs. Amtrak further agreed to pay Railroad Plaintiffs and other railroads for the use of their tracks, facilities and other services to provide such passenger services. The agreement to pay for such services was included in the Basic Agreements between Amtrak and Railroad Plaintiffs.

7. Paragraph 7.5 of the Basic Agreement provides that "transportation privileges, if any, with respect to business and personal travel of railroad personnel shall be determined by [Amtrak]." Pursuant to this paragraph, Amtrak upon initiating its intercity rail transportation services on May 1, 1971 voluntarily undertook to provide free or reduced-rate services to the employees of Railroad Plaintiffs. No attempt was made by Amtrak

to charge Railroad Plaintiffs or other railroads for providing such services.

8. On June 22, 1972, Public Law 92-316 ("P.L. 92-316") was enacted, adding Section 405(f) to the Act, 45 U.S.C. § 565(f). P.L. 92-316 required Amtrak to offer free or reduced-rate rail transportation services to present and retired railroad employees and their dependents who had been eligible to receive such free or reduced-rate services on April 30, 1971. In addition, P.L. 92-316 provided that Amtrak should be reimbursed by the railroads "for such costs as may be incurred" by Amtrak in offering such services. P.L. 92-316 further provided that if Amtrak and the railroads were unable to agree as to costs of such services, the matter was to be referred to the Interstate Commerce Commission for decision.

9. Pursuant to P.L. 92-316, Amtrak adopted a policy whereby it offered to all present and retired employees and their dependents who had been eligible to receive free or reduced-rate rail transportation services on April 30, 1971 free transportation privileges over the lines of their home railroad and half-fare transportation privileges over lines of other railroads, subject to the availability of space, with certain limitations on such travel for persons employed less than nine years on April 30, 1971. Amtrak has continued to offer such free or reduced-rate transportation privileges to such present and retired employees and their dependents from 1972 to the present date.

10. Amtrak and the railroads were unable to agree on the costs of providing such free or reduced-rate transportation services, and the matter was referred to the Interstate Commerce Commission. In a decision in Finance Docket No. 27194 dated December 18, 1972, the Commission set an "interim payment" rate of $0.00079 per passenger mile, based on preliminary evidence of the costs of providing free or reduced-rate transportation on a space-available basis. The Commission further deter-

mined that such compensation would be reduced by the additional revenues earned by Amtrak from the reduced-rate fare. Because such additional revenues always exceeded the compensation owed to Amtrak based on the Commission's computation of costs, Amtrak made no attempt to charge Railroad Plaintiffs for providing free or reduced-rate transportation services (except for charges for certain administrative expenses) until after the enactment of Public Law 96-73, described in the following paragraph.

11. On September 29, 1979, P.L. 92-316 was amended by the enactment of Public Law 96-73 ("P.L. 96-73"). P.L. 96-73 substituted for the provision that Amtrak should be reimbursed "for such costs as may be incurred" a provision requiring that during the 2-year period beginning on October 1, 1979, Amtrak should be reimbursed "at the rate of 25 per cent of the systemwide average monthly yield per revenue passenger mile." Amtrak has interpreted "systemwide average yield" to mean its average revenue from all fares (except commuter fares and reduced-rate fares) on all of Amtrak's system.

12. Commencing with the month of October 1979, Amtrak has billed ATSF for free or reduced-rate rail transportation services provided by Amtrak to present and retired ATSF employees and their dependents at rates varying from $ .02016 to $ .02343 per passenger mile. Such bills for the months of October 1979 through July 1980 are attached hereto as Exhibit C.

13. Pursuant to the Basic Agreement entered into between ATSF and Amtrak, there was due and owing from Amtrak to ATSF during the month of July 1980 $2,625,000 as advances for the use of ATSF track, facilities, and other services. Amtrak has refused to pay ATSF $282,624.69 of this amount. Amtrak has also refused to pay ATSF $53,625.13 from the final settlement of amounts due and owing for the month of May 1980.

Amtrak has claimed that it is entitled to retain such amounts, which total $336,624.69, to cover the billings which are attached hereto as Exhibit C. ATSF has, however, performed all obligations under the Basic Agreement entitling it to full payment of the July advances and the May final settlement.

14. The provision of Section 401 of the Act which relieves a contracting railroad "of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service," and the provision of the Basic Agreement which specifically relieves ATSF "of its entire responsibility for the provision of Intercity Rail Passenger Service," constitute binding obligations of the United States Government and of Amtrak, respectively, and are property rights protected by the Fifth Amendment to the United States Constitution.

15. The provisions of P.L. 92-316 and P.L. 96-73 which purport to require ATSF to reimburse Amtrak for providing free and reduced-rate rail transportation services to certain present and retired employees and their dependents substantially impair the aforesaid contractual obligations, in that such provisions require ATSF to pay for one type of intercity rail passenger service—the transportation of present and retired railroad employees and their dependents. Such impairment of contractual obligations constitutes a deprivation of property without due process of law in violation of the Fifth Amendment.

16. The provision of P.L. 96-73 which purports to require ATSF to reimburse Amtrak for providing such free or reduced-rate transportation services at the rate of 25 per cent of the systemwide average monthly yield per revenue passenger mile substantially impairs the aforesaid contractual obligations, in that such rate exceeds the costs of providing such service, and consequently requires ATSF to subsidize the provision of intercity rail passenger service by Amtrak to the general public. Such impairment of contractual obligations constitutes a depri-

vation of property without due process of law in violation of the Fifth Amendment.

17. There is an actual controversy between ATSF and Amtrak with respect to the right of Amtrak to reimbursement from ATSF for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents.

WHEREFORE, plaintiff ATSF prays that this Court:

1. Enter judgment in favor of ATSF and against Amtrak in the amount of $336,249.82, plus interest and costs.

2. Enter a further judgment declaring that Amtrak has no right to obtain reimbursement from ATSF for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents, and that the provisions of 45 U.S.C. § 565(f), to the extent they require such reimbursement, are invalid under the Constitution of the United States.

3. Grant ATSF such further relief as may be just and equitable.

COUNT II

1.-14. ATSF repeats and realleges the allegations of paragraphs 1 through 14 of Count I of this Complaint.

15. No ATSF employee or retiree (including those employees and retirees who were eligible for free or reduced-rate rail transportation services on April 30, 1971) has any contractual right to such services under any collective bargaining agreement, labor protective agreement or other agreement.

16. The availability of free or reduced-rate rail transportation services has no bearing upon the health, welfare, or safety of railroad employees. Such transportation privileges are not required to be provided to employees in any other industry.

17. The free or reduced-rate rail transportation services available to present and retired ATSF employees and their dependents from Amtrak are significantly greater than the free and reduced-rate rail transportation services which were available to such employees and their dependents from ATSF on April 30, 1971, in that, among other things, Amtrak offers such persons reduced-rate transportation over lines of other railroads, which ATSF did not offer on April 30, 1971.

18. The reimbursement required by P.L. 96-73 to be paid to Amtrak by ATSF for providing free and reduced-rate rail transportation services to ATSF employees and their dependents exceeds the costs of such services incurred by Amtrak.

19. The reimbursement required by P.L. 96-73 to be paid to Amtrak by ATSF for providing free and reduced-rate rail transportation services to ATSF employees and their dependents bears no reasonable relationship to the services provided in that such reimbursement is required to be computed at the same rate per passenger mile for reduced-rate transportation as for free transportation.

20. The free and reduced-rate rail transportation services for which ATSF is required by P.L. 92-316 and P.L. 96-73 to reimburse Amtrak includes transportation services furnished to persons who were retired from active employment with ATSF or who were dependents of persons retired from active employment with ATSF at the time such statutes were enacted, or on April 30, 1971.

21. In light of the facts alleged above, and particularly in paragraphs 15 through 20 of this Count II, the provisions of P.L. 92-316 and P.L. 96-73 purporting to require ATSF to reimburse Amtrak for providing free and reduced-rate rail transportation to present and retired employees and their dependents compel ATSF to make transfers of its property to other persons which transfers have, in whole or in part, no reasonable or

rational justification. Such transfers constitute a deprivation of property without due process of law in violation of the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiff ATSF prays that this Court:

1. Enter judgment in favor of ATSF and against Amtrak in the amount of $336,249.82, plus interest and costs.

2. Enter a further judgment declaring that Amtrak has no right to obtain reimbursement from ATSF for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents, and that the provisions of 45 U.S.C. § 565(f), to the extent they require such reimbursement, are invalid under the Constitution of the United States.

3. Grant ATSF such further relief as may be just and equitable.

• • • •

[Counts III, IV, V, VI, VII and VIII set forth similar allegations with respect to plaintiffs Burlington Northern, Baltimore and Ohio, Chesapeake and Ohio, and Union Pacific and are omitted in printing.]

[Exhibits A and C through I to the Complaint are omitted in printing.]

[Signatures Omitted in Printing]

EXHIBIT B TO COMPLAINT

[Table of Contents omitted in printing]

THE NATIONAL RAILROAD PASSENGER CORPORATION AGREEMENT

THIS AGREEMENT, dated as of April 16, 1971, between National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act of 1970 (hereinafter referred to as the "Act") and the laws of the District of Columbia (hereinafter referred to as "NRPC"), and the undersigned railroad (hereinafter referred to as "Railroad").

WHEREAS, NRPC was organized pursuant to the Act for the purpose of providing modern, efficient intercity rail passenger service within a national rail passenger system;

WHEREAS, in furtherance of that purpose, NRPC desires to contract with Railroad for the acquisition or use of certain equipment and facilities and for the furnishing of certain services;

WHEREAS, NRPC is in the process of entering into a number of contracts with other railroads identical with this Agreement save as to the provisions of Appendix B;

WHEREAS, the parties desire to enter into an agreement relieving Railroad of its responsibility to perform intercity rail passenger service, and facilitating the initiation of intercity rail passenger service by NRPC, on May 1, 1971;

WHEREAS, in order to do so, Railroad is willing to waive, during an interim period, certain elements of compensation which it believes are just and reasonable

and to which it believes it would otherwise be entitled; and

WHEREAS, therefore, the parties are unable to agree within the time available prior to May 1, 1971, on a basis for compensating Railroad subsequent to July 1, 1973, for the services, equipment and facilities which Railroad is undertaking to make available to NRPC hereunder, but in order to further the purposes of the Act and permit NRPC to undertake passenger service on a timely basis, the parties are willing to enter into this Agreement which, in Article Five, provides an initial basis for compensation and for a future redetermination of the basis for compensation.

NOW, THEREFORE, in consideration of the terms and conditions herein contained, NRPC and Railroad hereby agree as follows:

ARTICLE ONE

DEFINITIONS

"Intercity Rail Passenger Service" means all rail passenger service over the lines of Railroad owned, leased, or operated by Railroad other than (i) commuter and other short-haul service in metropolitan and suburban areas usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations, and (ii) auto-ferry service characterized by transportation of automobiles and their occupants where contracts for such service have been consummated prior to October 30, 1970.

"Intercity Rail Passenger Trains" means all trains operated in Intercity Rail Passenger Service.

"Act" means the "Rail Passenger Service Act of 1970."

"Commission" means "Interstate Commerce Commission."

"Rail Lines" is defined in Section 4.1.

ARTICLE TWO

TRANSFER OF PASSENGER SERVICE

Section 2.1. Relief from Responsibility.

From and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service. Railroad shall not, without the prior written consent of NRPC, operate or provide any regularly scheduled Intercity Rail Passenger Service except pursuant to and in accordance with this Agreement.

If, having fully complied with the notice or other provisions of Section 401(a)(1) of the Act, Railroad is required, because of any order of any Federal, State or local court or agency of government, whether or not such order is lawfully issued, to continue or resume operation of any Intercity Rail Passenger Train beyond April 30, 1971, NRPC and Railroad will cooperate in efforts to effectuate discontinuance thereof.

[Section 2.2 through 7.4 omitted in printing]

Section 7.5. Transportation Privileges.

Company mail of Railroad may be transported by Railroad without charge on any Intercity Rail Passenger Trains operated by it over its lines, provided that no extra or special personnel shall be required in connection with the handling thereof.

Business cars of Railroad and Railroad officials and administrative personnel transported therein may be handled on Intercity Rail Passenger Trains, provided that the same may be done consistent with the safe and efficient operation of such trains and shall not cause any material delays in the operation thereof and that any additional cost resulting therefrom will be borne by Railroad.

Railroad shall deadhead passenger cars in freight trains, at the request of NRPC, provided that the same may be done consistent with the safe and efficient operation of such freight trains and that any additional cost resulting therefrom will be borne by NRPC.

Employees of Railroad shall be entitled to ride on Intercity Rail Passenger Trains, including locomotives, without charge, whenever necessary in connection with the inspection, maintenance or operation of such trains.

Transportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by NRPC.

[Remainder of Exhibit B to Complaint omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

ANSWER

Defendant, National Railroad Passenger Corporation (hereinafter referred to as Amtrak), hereby answers the Complaint as follows:

FIRST DEFENSE

Defendant Amtrak hereby answers the numbered paragraphs of the Complaint as follows:

COUNT I

1. [The text of each numbered paragraph of the Complaint was set out in the Answer, but has been replaced in printing by asterisks.] * * *

Answer: Admit.

2. * * *

Answer: Admit.

3. * * *

Answer: The allegations of paragraph 3 set forth conclusions of law, not allegations of fact to which an answer is required, however, insofar as an answer may be deemed required, defendant Amtrak admits that the amount in controversy exceeds $10,000, exclusive of interest and costs, but denies the remaining allegations of this paragraph.

4. * * *

Answer: Admit that on or before April 30, 1971, ATSF was engaged in the business of offering or providing railroad passenger transportation services as a com-

mon carrier under the Interstate Commerce Act. Defendant further admits that Exhibit A to the Complaint is an authentic copy of ATSF's "pass policy," but respectfully refers the court to Exhibit A to the Complaint for a full and complete statement of the contents thereof and denies the remaining allegations of paragraph 4 of the Complaint referring to the contents of Exhibit A in that they are not a full and complete statement of the terms of Exhibit A. Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that such free or reduced-rate transportation privileges were not required to be provided pursuant to any contract between ATSF and its employees. Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that ATSF did not offer its then present and retired employes or their dependents free or reduced-rate transportation privileges over lines of other railroads.

5. • • •

Answer: Admit that in 1970 the National Railroad Passenger Service Act (the "Act"), 45 U.S.C. § 501, *et seq.*, was enacted, but respectfully refer the Court to the Act for a full and complete statement of its contents. Defendant admits that ATSF entered into a contract with Amtrak, effective April 16, 1971 and that Exhibit B to the Complaint is an authentic copy of such contract, but respectfully refers the court to Exhibit B to the Complaint for a full and complete statement of the contents thereof and denies the remaining allegations of paragraph 5 of the Complaint that refer to the contents of the contract in that they are not a full and complete statement of the terms of Exhibit B. Amtrak admits that ATSF has in fact paid 50% of its fully distributed passenger service deficit for the year ending December 31, 1969 which totalled $21,053,773 to Amtrak and that on May 1, 1971 ATSF ceased offering intercity rail passenger service to the public but Amtrak is without knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in this paragraph.

6. • • •

Answer: Admit.

7. • • •

Answer: Admit that Paragraph 7.5 of the Basic Agreement includes the quoted language but respectfully refer the Court to Paragraph 7.5 of the Basic Agreement for a full and complete statement of the contents thereof. Also admit that Amtrak did provide some reduced-rate services to the employees of Railroad Plaintiffs prior to the enactment of Public Law 92-316 and that Amtrak did not charge Railroad Plaintiffs or other railroads for such services. Amtrak denies the remaining allegations of this paragraph.

8. • • •

Answer: Defendant admits that on June 22, 1972, Public Law 92-316 ("P.L. 92-316") was enacted, adding Section 405(f) to the Act, 45 U.S.C. § 565(f) but respectfully refers the court to such statute for a full and complete statement of its contents and denies the remaining allegations of paragraph 8 of the Complaint in that they are not a full and complete statement of the contents of P.L. 92-316.

9. • • •

Answer: Admit.

10. • • •

Answer: Admit that Amtrak and the railroads were unable to agree to the cost of providing such free or reduced-rate transportation services, and the matter was referred to the Interstate Commerce Commission. Amtrak further admits that a decision in Finance Docket No. 27194 dated December 18, 1972, did make a determination on this question but respectfully refers the court

to such decision for a full and complete statement of its contents thereof and denies the remaining allegations of paragraph 10 which refer to the decision in that they are not a full and complete statement of the terms of the decision. Amtrak also admits that it did not charge Railroad Plaintiffs for providing free or reduced-rate transportation service (except for charges for certain administrative expenses) until after the enactment of Public Law 96-73.

11. • • •

Answer: Admit that on September 29, 1979, P.L. 92-316 was amended by the enactment of Public Law 96-73 ("P.L. 96-73") but respectfully refers the court to Public Law 96-73 for a full and complete statement of its contents and deny the remaining allegations of paragraph 11 which refer to the contents of Public Law 96-73 since they are not a full and complete statement of the terms of the statute. Admit that Amtrak has interpreted "systemwide average yield" to mean its average revenue from all fares (except commuter fares and reduced-rate fares) in all of Amtrak's system.

12. • • •

Answer: Admit

13. • • •

Answer: Admit that ATSF did bill Amtrak during the month of July 1980 for $2,625,000 as advances for the use of ATSF track, facilities and other services and that Amtrak has not paid $282,624.69 of this amount. Further admit that ATSF has billed Amtrak for $53,-625.13 from the final settlement of amounts claimed by ATSF for the month of May 1980 and that Amtrak has not paid this amount. Amtrak has retained $336,249.82 of the amounts billed by ATSF to cover the billings which are attached to the Complaint as Exhibit C. Amtrak denies that ATSF is entitled to full payment of the July advances and the May final settlement.

14. • • •

Answer: Deny.

15. • • •

Answer: Deny.

16. • • •

Answer: Deny.

17. • • •

Answer: Admit.

WHEREFORE, plaintiff ATSF prays that this Court:

1. • • •

Answer: Defendant denies that plaintiff is entitled to a judgment in the amount of $336,249.82 plus interest and costs, or to any relief whatsoever.

2. • • •

Answer: Defendant denies that ATSF is entitled to a judgment declaring that Amtrak has no right to obtain reimbursement from ATSF for providing free and reduced-rate transportation for present and retired employees of ATSF and their dependents, denies that ATSF is entitled to a judgment declaring that the provisions of 45 U.S.C. § 565(f), are invalid under the Constitution of the United States and denies that ATSF is entitled to any relief whatsoever.

3. • • •

Answer: Defendant denies that ATSF is entitled to any relief whatsoever.

COUNT II

1-14. • • •

Answer: Defendant repeats and realleges its responses to paragraphs 1-14 of Count I of the Complaint.

15. • • •

Answer: Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in this paragraph.

16. • • •

Answer: Deny but defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that free or reduced-rate rail transportation services are not required to be provided to employees in any other industry.

17. • • •

Answer: Deny but defendant states that it is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that ATSF did not offer reduced-rate transportation over lines of other railroads on April 30, 1971. Amtrak does admit that Amtrak offers such persons reduced-rate transportation over lines of other railroads.

18. • • •

Answer: Deny.

19. • • •

Answer: Deny but admit that such reimbursement is required to be computed at the same rate per passenger mile for reduced-rate transportation as for free transportation.

20. • • •

Answer: Admit.

21. • • •

Answer: Deny.

WHEREFORE, plaintiff ATSF prays that this Court:

1. • • •

Answer: Deny that ATSF is entitled to a judgment against Amtrak in the amount of $336,249.82 plus interest and costs, or to any relief whatsoever.

2. • • •

Answer: Deny that ATSF is entitled to a judgment declaring that Amtrak has no right to obtain reimbursement from it for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents, deny that ATSF is entitled to a judgment declaring that the provisions of 45 U.S.C. § 565(f) are invalid under the Constitution of the United States and further deny that ATSF is entitled to any relief whatsoever.

3. • • •

Answer: Defendant denies that ATSF is entitled to any relief whatsoever.

[The responses to the allegations contained in Counts III, IV, V, VI, VII and VIII of the Complaint are omitted in printing.]

Any allegations not specifically answered above are hereby denied.

FIRST AFFIRMATIVE DEFENSE

This dispute in part concerns the interpretation, application and implementation of the "Basic Agreements," as amended, between plaintiffs and defendant (Exhibit B to the Complaint) and must be submitted to binding arbitration in accordance with Article 6 of the Basic Agreements.

SECOND AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, having fully answered, defendant Amtrak prays for dismissal of this action, judgment in its favor and such other and further relief as the Court may deem appropriate.

[Signatures Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Atchison, Topeka and Santa Fe Railway Company, Burlington Northern, Inc., Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, and Union Pacific Railroad Company hereby move this Court, pursuant to Rule 56, Federal Rules of Civil Procedure, for summary judgment in their favor on all counts of the Complaint herein.

Plaintiffs are submitting to the Court herewith Affidavits of D.G. Ruegg, W.J. Taylor, R.K. Knowlton, W.F. Howes, Jr., J.R. Davis, J.P. Deasey, and F.S. Farrell in support of this Motion, together with a supporting Memorandum.

[Signatures Omitted in Printing]

[EXHIBIT A to the affidavit of R.K. Knowlton filed in support of Plaintiffs' Motion for Summary Judgment]

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
December 20, 1972

Finance Docket No. 27194

DETERMINATION OF COST REIMBURSEMENT UNDER SECTION 405(f) OF THE RAIL PASSENGER ACT, AS AMENDED.

Decided December 18, 1972[*]

Upon investigation: Proposed cost reimbursement to National Railroad Passenger Corporation by all railroads for providing free and reduced-rate transportation to employees, retirees, and dependents of each railroad, pursuant to Section 405(f) of the Rail Passenger Service Act of 1970, as amended by P.L. 92-316, who are eligible for such transportation, found not shown to be just and reasonable. Interim just and reasonable allowances determined.

William C. Clarke and *T. Page Sharp* for petitioner. *John W. Adams, James A. Bistline, Donald A. Brinkworth, Donald A. Engle, Richard K. Knowlton, William M. Moloney, Raymond E. Skov,* and *Erle J. Zoll, Jr.,* for respondents. *Edward J. Hickey, Jr., William J. Hickey, William G. Mahoney,* and *Geoffrey N. Zeh,* for intervenors.

[* On December 21, 1972, the Commission notified all parties of "certain ministerial errors" in its Report and Order of December 18, 1972. The corrected versions of the Report and Order are set forth in this Joint Appendix; the uncorrected version of the Report appears at 347 ICC 325 (1972).]

DIVISION 3, COMMISSIONERS TUGGLE, BREWER, AND MONTEJANO BY THE DIVISION:

We are asked in this proceeding to determine that 8.6¢ per passenger-mile is a just and reasonable amount by which the railroad should reimburse the National Railroad Passenger Corporation (AMTRAK) for providing free or reduced-rate transportation to railroad employees and retirees, and their dependents (hereinafter referred to collectively as employees), under Section 405(f) of the Rail Passenger Service Act of 1970 (the Act), as amended by P.L. 92-316, effective June 22, 1972. We are also requested to determine that the actual costs incurred by Amtrak in implementing and administering the requirements of said section 405(f) should be billed to the railroads as incurred, allocated on the basis of the number of pass riders from each railroad, and that the obligation for reimbursement shall be with the railroad having the employment relationship with the eligible employee.

The requests were made by Amtrak through a petition filed September 21, 1972, pursuant to the Section 405(f). On October 10, 1972, the railroads filed a motion to dismiss for lack of jurisdiction and an alternative reply to Amtrak's petition.

Section 405(f) reads as follows:

> The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this Act, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all

> railroad employees eligible to receive free or reduced-rate transportation under such policies or agreement, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. *The Corporation shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees under any policy or agreement referred to in the first sentence of this subsection, including the costs of implementing and administering this section.* Within ninety days after the enactment of this sentence, each railroad shall enter into an agreement with the Corporation for the payment of such expenses. *If the Corporation and a railroad are unable to agree as to the amount of any payment owed by the railroad under this subsection, the matter shall be referred to the Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, and the decision shall be binding on both parties.* If any railroad company which operates intercity passenger service not under contract with the Corporation notified the Corporation and railroads which have entered into the agreement specified above that it will accept the terms of the system-wide schedule of terms and the compensation specified in the agreements, such railroad company shall be reimbursed for services to railroad employees in accordance with the agreements. As used in this subsection, the term 'railroad employee' means (1) an active fulltime employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company and (3) the dependents of any employee referred to

in clause (1) or (2) of this sentence. (Emphasis added.)

Negotiations during the 90-day period following enactment of Section 405(f) were unsuccessful, and, the matter was immediately thereafter presented to us for resolution. The Act provides that this Commission shall decide the issue within ninety days following the date of referral, that is, by December 20, 1972. In view of that statutory time limitation, the modified procedure was employed to expedite disposition.

Pursuant to that procedure, Amtrak filed its position statement on October 19, 1972; the railroads followed with their statement on November 3, 1972; and Amtrak filed a reply statement on November 13, 1972. The Congress of Railroad Unions (CRU) was granted permission to intervene on November 2, 1972, and filed a statement on November 3, 1972. The Railway Labor Executives' Association (RLEA) was denied permisison to intervene on November 10, 1972. Upon consideration of the petition of RLEA that its intervention will not delay this proceeding, permission to intervene is hereby granted, and the RLEA statement of position, submitted November 1, 1972, is accepted for filing.

On November 27, 1972, the railroads moved for leave to file a supplemental statement tendered therewith, on grounds that Amtrak, in its rebuttal, introduced evidence not included in its initial statement, and that such evidence was available for submission in the initial statement. Additionally, they contend that the CRU statement contains an argument which the railroads should be allowed to answer. Upon consideration of the new evidence in the Amtrak rebuttal statement and of the CRU argument, we conclude that the motion for leave should be granted and that the supplemental statement of position tendered on November 27, 1972, should be, and it is hereby, accepted for filing in this proceeding.

On November 30, 1972, the railroads also filed a petition requesting this Commission to investigate and determine the costs of implementing and administering the proposed Amtrak pass policy; however, on December 19, 1972, Amtrak and the railroads filed a joint motion for dismissal of this petition on the ground that they had reached agreement as to the cost of implementing and administering the pass policy. The motion was granted by order of December 19, 1972. This matter will not be further considered. Also, on December 8, 1972, Amtrak filed a motion seeking leave to file Exhibit No. NRPC-8, and the railroads filed an answer to this motion on December 14, 1972. Finally, on December 13, 1972, CRU filed a reply to the supplemental statement of the railroads.

On December 8, 1972, Amtrak entered an answer to the railroads motion for leave to file a supplemented statement or in the alternative to file a surrebuttal statement tendered therewith in order that they may correct errors of fact and misconceptions in the railroads' supplemental statement. In consideration of our need for all available information from the parties we conclude that the motion for leave should be granted and that the surrebuttal statement tendered on December 8, 1972, should be, and it is hereby accepted for filing in this proceeding.

Jurisdictional issue.—In their motion to dismiss the [sic], the railroads refer to the fact that section 405 of the Act (P.L. 91-518) provided that labor protective arrangements were to be a part of any contract entered into between a railroad and Amtrak relieving such railroad of all obligations to provide intercity rail passenger service. Such protective provisions were required to be certified by the Secretary of Labor as adequately protecting the rights of all affected employees. The subsequently executed contract was so certified on April 16, 1971. The contract provisions did not cover the right of employees to free or reduced fare transportation. On April 30,

1971, the railroads had in effect arrangements under which free or reduced fare transportation was provided to eligible employees. The railroads argue that the existence of these voluntary arrangements is sought to be made the basis for the imposition upon the railroads, both Amtrak and non-Amtrak, of new obligations contrary to the provisions of the existing contracts with Amtrak and contrary to the provisions of Public Law 91-518. Under section 405(f) of the act (Public Law 92-316), we are required to determine an amount to be paid over to Amtrak which would be an additional liability and therefore an imposition of an unconstitutional liability contrary to the provisions of the Fifth and Fourteenth Amendments.

The issue of whether the statute violates the Constitution is obviously not one for our determination. See *Public Utilities Commission v. United States*, 355 U.S. 534, 539-540 (1958). Moreover, in furtherance of its enumerated powers such as the power to regulate interstate commerce, Congress may affect or even "impair" existing contractual arrangements. See, e.g., *El Paso v. Simmons*, 379 U.S. 497 (1965); *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Lichter v. United States*, 334 U.S. 742 (1948); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); and *Norman v. Baltimore & Ohio, R.R. Co.*, 294 U.S. 249 (1935). The motion to dismiss, therefore, is denied.

Amtrak's position.—Amtrak urges that, by section 405 (f), it is obligated to provide a service for railroad employees which was previously an exclusive obligation of the railroads, and what was previously voluntary has been made a matter of right on a space available basis. The reimbursement to be paid by the railroads is for "such costs as may be incurred". The traveling public and the taxpayers, to the extent that they underwrite Amtrak's deficits, are to bear no part of the cost of providing such free transportation. Amtrak asserts that

this proceeding essentially involves ratemaking principles, and that the basis for reimbursement cannot be less than a "cost-compensatory" rate as that term is used in ICC rate proceedings. It is claimed that to meet the standard of being compensatory, the costs contemplated by Section 405(f) must, as a minimum, cover the long-run variable cost of providing this obligatory transportation service, since such obligation is of a long-term duration for costing purposes and they include a substantial number of eligibles. However, Amtrak further contends that since pass riders will represent 20% of revenue passenger miles, fully-allocated costs would be the most appropriate basis for determining the required cost reimbursement. The fully allocated cost has been determined by Amtrak to be 8.6¢ per passenger-mile, based on its operations from May to December 1971 (See Appendix A). The cost of 8.6¢ per passenger-mile was computed by dividing the total passenger miles into railway operating expenses, reduced by revenues from non-passenger carrying activities (mail, express, etc.) and from passenger carrying activities not covered by pass privileges (sleeping cars, etc.). The calculation is set forth in Appendix A hereto.

In arriving at the above proposed fully-allocated cost, Amtrak argues that the space available criterion can not be used with respect to the 57.6 percent of the seat miles which are on a non-reserved basis (See Appendix C). It alleges that maintaining control of the non-reserved seat miles would entail prohibitive cost in that the trains stop at many terminals which are not constructed to permit gate control type of screening similar to the airlines. Amtrak further argues that although the airlines use a strict space available criterion, including a "bumping" procedure, it should be noted that the airlines operate many flights to few terminals almost entirely on a reserved basis. In contrast, control over the use of the non-reserved seats on a strict space-available basis on passenger trains would, according to Amtrak, require personnel stationed

at each car at each stop to bump pass riders to make room for revenue passengers. Amtrak estimates this cost of implementation to be approximately $42.1 million per year, which, pursuant to section 405(f) would be completely reimbursable by the railroads as a cost incurred in implementing or administering the statute.

A space available procedure has been included by Amtrak in its interim procedures for pass riders to the extent deemed possible. (See appendix B). The procedure permits pass riders to make advance reservations only within 24 hours of scheduled train departure. In addition, provision is made for the issuance of a monthly Space Availability Status Report identifying those trains in which no space is available for pass riders. However, these procedures do allow for the making of advance reservations on such peak trains within four hours of scheduled train departure. Amtrak asserts that while these procedures restrict the degree to which pass riders compete for available reserved space, they meet the requirements of the statute.

Railroads' Position.—The railroads assert that Amtrak's costs reimbursement will be insubstantial considering (1) the space-available limitation imposed upon the free or reduced-rate transportation and (2) the offsetting revenues obtained by Amtrak from the reduced rates and from the purchase by the pass riders of meals and other services. The railroads contend that the plain language of the statute entitles eligible employees to free or a reduced-rate transportation only "provided space is available" after other passengers have been accommodated; and that the transportation costs, if any, for which Amtrak is to be reimbursed are only those added costs incurred solely as a result of eligible employees occupying available space that otherwise would have been empty, after being offset by the reduced-rate and other revenues received by Amtrak from such passengers. The railroads estimate those costs, prior to being offset by Amtrak revenues, amount to .867 mills per passenger-mile. (See Appendix F), and are zero after being offset by reduced-rate revenues.

In supporting the reasonableness of the less than 1 mill per passenger mile figure, the railroads have included evidence of the pass charges for space available coach travel of four major domestic airlines, who comprise over 60 percent of the domestic airline industry. The charge per passenger mile varies from 2.02 mills to 7.6 mills. These costs include food which would not be provided to railroad pass riders. Deducting the charge for food leaves a net charge for air coach space available pass riders of 2.9 mills per passenger mile for a New York-Cleveland trip and 0.7 mills for a New York-San Francisco trip. (See appendix H).

The railroads assert that Amtrak is attempting to ignore the space-available limitation in the statute, and to obtain this Commission's aid in charging the railroads twice as much as its revenue pasengers pay for transportation on Amtrak trains, i.e., 4.6¢ per revenue passenger-mile, (appendix E) compared to the fully allocated cost of 8.6¢ per passenger-mile (appendix A). The railroads contend that the Congress, in imposing a space available limitation, intended it to mean that such traffic would be accommodated only if unused space is available after other traffic has been accommodated; that the legislative history shows that the Congress did not contemplate that the cost incurred, if any, would be substantial; nor was it intended that such costs were to be determined on a fully allocated cost basis, or a long-term variable cost basis, or any other basis utilized in fixing rates for common-carrier transportation. The railroads argue that the instant proceeding does not concern rate-making; that the Congress did not direct this Commission to determine the rate to be charged by Amtrak; and that Amtrak's position that the amount of reimbursement should be fully allocated costs, since such costs cannot be less than

a cost-compensatory rate, as that term is used in rate proceeding, should not be accepted by this Commission.

The railroads assert that section 405(f) authorizes this Commission only to determine the amount to be paid by the railroads to Amtrak for such "costs as may be incurred" in transporting eligible employees free or at reduced rates, "provided space is available". If Amtrak wants the railroads to pay for the transportation of such employees without enforcing the space-available limitation, whether because of the impossibility of complying with that limitation or for some other reason, it should resort to the Congress rather than to this Commission. It is the contention of the railroads that the proposed policy of limiting the imposition of the space available limitation to reserved trains, without such imposition on non-reserved trains, does not meet the statutory requirements. The railroads also argue that Amtrak is in error in not providing for an off-set of revenues against the costs incurred in providing such transportation. They contend that an examination of the legislative history supports their argument. Senate Report No. 92-756, 2nd Session, on page 12, expressly states that such revenues are to be offset against the costs incurred.

With respect to the matter of identifying eligible employees, the railroads contend that the statute limits eligibility to those who were eligible on April 30, 1971, under a railroad policy in effect on that date. Amtrak's policy imposes the cutoff as to eligible persons in some instances in terms of employment on such date. The railroads assert that the fact that a person is employed by a railroad on April 30, 1971, is immaterial, if he was not also eligible on that date to receive free or reduced-rate transportation under a railroad policy.

Position of Labor Unions.—Both the CRU and the RLEA contend that this Commission's jurisdiction is limited to the determination of the amount to be reimbursed by the railroads for providing transportation to

pass riders. They contend that the railroads are in error in seeking to extend that jurisdiction to make a determination of the adequacy of the pass policy determined by Amtrak and the persons eligible thereunder.

Discussion and Conclusion

Pursuant to Section 405(f) of the Act we are entrusted with the difficult task of determining the amount Amtrak "shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees . . . . including the costs of implementing and administering this section." Amtrak has been given the responsibility of providing free or reduced-rate transportation by railroad to any railroad employee eligible to receive such service on April 30, 1971, under the terms of any policy or agreement in effect on such date, "provided space is available." Amtrak has also been given the discretionary power of applying to all eligible railroad employees a pass policy consisting of "a single systemwide schedule of terms *determined by the Corporation* to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971," (emphasis added). The language of the statute is explicit. Our sole jurisdiction is to determine "amount of any payment owed by the railroad" for Amtrak's provision of free or reduced-rate transportation to eligible employees, including the cost of implementation and administration.

We believe that Amtrak has effectively implemented the space-available criterion with respect to the occupancy, by pass riders, of the 42.4% of its seat miles operated on a reserved basis. Generally, competition for such space by pass riders with full revenue riders has been substantially restricted by Amtrak's 24- and 4-hour reservation policy. Adequate measures have been taken to give priority to full revenue passengers in availing themselves of reserved space. Although some revenue may be

lost if pass riders obtaining late-hour reservations "block" potential full revenue passengers, those pass riders would provide some offsetting revenue in the form of reduced-rate fares, sleeping car charges, dining car charges, and charges for other services. Revenues of that kind will be made available to Amtrak through utilization by pass riders of otherwise empty space.

As to the space available criterion with respect to the 57.6% non-reserved seat miles operated, we are convinced that Amtrak has no truly effective way of applying it. There is no suggestion in the record as to how the space available limitation can be enforced on these non-reserved trains, short of excluding pass riders from using them. In consideration of this situation, we are of the opinion that the monthly report of space availability should include those non-reserved trains or sections on which pass riders are not allowed. Implementation of this exclusionary feature in the pass policy issued by Amtrak will result in their effectively meeting the space availability proviso of section 405(f).

It is noted that in a proceeding before the Civil Aeronautics Board it was found that discount fares generated a need for more capacity and its related costs. However, the case concerned the continuation of a promotional pricing technique which could unnecessarily burden the general fare level. This situation is not similar to our consideration of costs related to employee pass riders but rather to excursion trips promoted by Amtrak or non-Amtrak railroads. Our proceeding does not concern the generation of additional revenue passengers by use of discount fares. See: Civil Aeronautics Board Docket 21866-5, *Domestic Passenger-Fare Investigation*, Decided December 5, 1972.

We have no doubt that, aside from the costs of implementation and administration of a pass policy, Amtrak will incur some added transportation costs. A determination of these costs prospectively, without actual ridership figures for a period of time, unquestionably is not wholly reliable. The degree of utilization of these services by the free or reduced rate riders is an important factor that must be considered in the determination of the amount of cost reimbursement. We cannot accept, at this time, Amtrak's projection that pass riders will represent 20 percent of revenue passenger miles. Not only do we not have actual ridership figures for a sufficient period of time to make a judgment, but this projection assumes a constant level of revenue ridership. It ignores the fact that revenue ridership will of necessity be subject to fluctuation as Amtrak adds and substitutes services. It also ignores the fact that the eligible employees have been determined by the cut off date of April 30, 1971, and will only decrease, as time passes, through attrition. We cannot assume that added services will be provided for the sole benefit of pass riders. Services are operated for the benefit of revenue riders, and the carriage of pass riders is incidental thereto. In addition, we cannot accept the argument that all of the expenses will vary with the addition of an, as yet, unknown, number of pass riders. Admittedly, some expenses are directly affected by volume, e.g., those associated with tickets, baggage checks, and on-train and station supplies, but others may not be so affected.

We cannot accept the railroads' argument that the increase in passenger volume, no matter how small, will contribute additional revenue without any related expense. Nor can we agree with their contention that the availability of space should be determined for railroads in a manner similar to that used by the airlines. The two modes have significantly different operating characteristics. We do believe, as stated previously, that it is possible for Amtrak to exclude free and reduced-rate pass riders from heavily-used trains when other services are available over the same route, as they have done with

respect to the New York-Washington Metroliners and the New York-Boston Turbotrains.

As stated, a determination of prospective costs, without data derived from the experience of actual operations, is not as reliable as is ordinarily desirable. Nevertheless, considering the time limitation imposed by the statute, it is here unavoidable. While the statute makes no specific provision for modification of the decision required to be made, as does section 16(6) of the Interstate Commerce Act with respect to other orders issued by the Commission, since we are empowered to make a decision "binding on both parties," it is a reasonable assumption that we have the derivative power to modify that decision upon an augmented record, based on changed circumstances or the availability of more reliable data.

Accordingly, at this time we shall approve an interim payment of 0.79 of a mill per passenger-mile which is the resultant mean between the May and August 1972 cost elements (Appendix F and G), and which will represent interim compensation to Amtrak for the minimal variable costs incurred in providing transportation services to eligible railroad employees on a space available basis, with the revenue generated by the reduced-rate fare offset against such amount. This rate of payment will not unduly burden the railroads making such payments, and will encourage Amtrak to enforce the space available provision to the maximum extent possible. We shall also provide that such payment shall be redetermined after the pass policy is in operation for a period of at least twelve months. The proceeding will be held open, and at the end of that period, Amtrak and the railroads shall submit the information requested in Appendix D hereto; and the matter will then be further considered, with the possibility of retroactive adjustments.

We find that the interim amount of cost reimbursement, as set forth above, provides a just and reasonable

basis for deciding, for the time being, the issues raised by the record as presented, but that they should be observed by the parties, subject to the submission of the data required by Appendix D hereto, and to possible adjustment in the future, perhaps with an effect retroactive to the date of this decision.

An appropriate order will be entered.

[Appendices A through H omitted in printing]

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 18th day of December, 1972.

Finance Docket No. 27194

DETERMINATION OF COST REIMBURSEMENT UNDER SECTION 405(f) OF THE RAIL PASSENGER SERVICE ACT, AS AMENDED

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That National Railroad Passenger Corporation shall charge all railroads at an interim amount of 0.79 of a mill per passenger mile subject to offset by revenue derived from reduced-rate fares for providing transportation services to eligible railroad employees pursuant to section 405(f) of the Rail Passenger Service Act as amended.

It is further ordered, That National Railroad Passenger Corporation and all affected railroads shall submit the information required in Appendix D for a period of twelve months of operation of the pass policy to aid this Commission in the determination of a just and reasonable cost reimbursement payment for transportation service and administration;

And it is further ordered, That this proceeding otherwise shall remain open for the receipt of the data referred to next above, and for further proceeding thereafter to be determined.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

DEFENDANT NATIONAL RAILROAD PASSENGER CORPORATION'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant National Railroad Passenger Corporation ("Amtrak"), through its undersigned counsel, hereby moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in its favor on all counts of Plaintiffs' Complaint.

In support of defendant's motion, the Court is respectfully referred to defendant Amtrak's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment and the exhibits attached hereto.

[Signatures Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

AFFIDAVIT OF ROGER LEWIS

Roger Lewis, being first duly sworn, deposes and says as follows:

1. On May 1, 1971, I became the first President and Chairman of the Board of the National Railroad Passenger Corporation ("Amtrak"). I served as President until February 28, 1975 and Chairman through July 30, 1975.

2. At the time Amtrak was created, it was estimated that between 1,400,000 to 2,000,000 rail travel passes had been issued by the railroads and were still outstanding.

3. In order to reduce the cost to Amtrak of the large number of outstanding passes and because there was no obligation for Amtrak to continue the pass policies of the railroads, Amtrak decided that pass privileges should be confined to employees of the railroads which operated trains on behalf of Amtrak. These privileges were limited to half-rate fares; causing the elimination of all free transportation. Employees of other railroads lost all pass privileges. Letter No. 10, April 23, 1971, Exh. 4.

4. The railroads protested Amtrak's drastic curtailment of the pass privileges which the railroads had previously given to their employees.

5. As recorded in the minutes of the June 24, 1971 and July 29, 1971 meetings of the Amtrak Board of Directors (Exhs. 5, 6), the railroads represented to Amtrak that the withdrawal of free transportation privileges for their employees threatened to produce severe labor problems for them. Specifically, their concerns were about the deterioration of employee morale and the possibility of strikes if the privileges were not restored.

6. The reference in the June 24, 1971 minutes to the "status of litigation" relating to rail passes refers to the fact that employees of the Penn Central Transportation Company had threatened a strike if their pass privileges were not reinstated.

7. In urging Amtrak to restore pass privileges, the railroads argued that the withdrawal of the privileges interfered with the expectations of the railroads' employees. Some railroads asserted that the withdrawal of these rights was an act of bad faith. This sentiment also was echoed by the labor representative, Charles Luna, on the Amtrak Board.

8. The Association of American Railroads, the railroad's trade association, wrote Amtrak Board member General Frank S. Besson on the matter of pass privileges and pointed out that:

> Railroad employees have attached great importance to pass privileges. They have considered them part of their employment privileges and as a fringe benefit and reward for service.

Exh. 7.

Further affiant sayeth not.

/s/ Roger Lewis
ROGER LEWIS

SUBSCRIBED and SWORN
BEFORE ME THIS 5th DAY OF NOVEMBER, 1981.

/s/ Anita L. Martin
Notary Public
My Commission Expires July 31, 1984

[Exhibit 3 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

BY THE COMPTROLLER GENERAL

REPORT TO THE CONGRESS

OF THE UNITED STATES

HOW MUCH SHOULD AMTRAK BE REIMBURSED FOR RAILROAD EMPLOYEES USING PASSES TO RIDE ITS TRAINS?

The Amtrak Reoganization Act of 1979 required GAO to study the free or reduced rate transportation Amtrak provides to railroad and terminal company employees, retirees, and their spouses and dependents under the Rail Passenger Service Act. The act also required GAO to recommend the appropriate means to reimburse Amtrak for its costs to provide the transportation.

As of December 1979, about 1 million people were eligible. During 1979 they used Amtrak-issued passes to make 384,000 trips and travel 140 million miles.

GAO concludes that the costs Amtrak incurs to furnish transportation to pass riders are debatable, and the Congress must decide for which costs Amtrak should be reimbursed.

[GAO SEAL]

CED-80-83
MARCH 28, 1980

[SEAL]

COMPTROLLER GENERAL OF THE
UNITED STATES
Washington, D.C. 20548

B-196907

To the President of the Senate and the
Speaker of the House of Representatives

This report concerns the free and reduced rate transportation Amtrak provides to railroad employees and retirees and their spouses and dependents under the Rail Passenger Service Act (45 U.S.C. 565(f)). The report describes the program's background and discusses its costs and benefits, the value of the service provided, and the reimbursement to Amtrak.

The Amtrak Reorganization Act of 1979—Public Law 96-73, Section 120(b)—required us to conduct the study and report the results to the Congress and the Interstate Commerce Commission. Our report was to include recommendations for reimbursing Amtrak for the free and reduced rate transportation.

Amtrak's costs to provide transportation to pass riders are debatable, and we did not find adequate analytical evidence to support one position over another or to recommend a specific means to reimburse Amtrak. We conclude that the matter requires a policy decision by the Congress and suggest alternatives regarding how much Amtrak should be reimbursed for pass rider travel.

We are sending copies of this report to the Chairman, Interstate Commerce Commission; the Director, Office of Management and Budget; the Secretary of Transportation; the president of Amtrak; and the chairmen of the congressional committees concerned with railroad passenger service.

/s/ Elmer B. Staats
Comptroller General
of the United States

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ABBREVIATIONS

Amtrak	National Railroad Passenger Corporation
GAO	General Accounting Office
ICC	Interstate Commerce Commission

CHAPTER 1

INTRODUCTION

The Amtrak Reorganization Act of 1979 (Public Law 96-73) requires us to study the free and reduced rate transportation provided railroad employees by the National Railroad Passenger Corporation (Amtrak) under section 405(f) of the Rail Passenger Service Act.[1] We are to report the results to the Congress and the Interstate Commerce Commission (ICC) with recommendations for the means to reimburse Amtrak for the cost of providing the transportation, taking into account the service's value. In addition to responding to the act, this report includes data on railroad employees who are not eligible under the Rail Passenger Service Act but have been extended reduced rate travel privileges by Amtrak.

The Rail Passenger Service Act, as amended, gives certain railroad and terminal company employees and retirees, along with their spouses and dependents, the right to free or reduced rate personal travel on Amtrak, if space is available. Widows of certain eligible employees and retirees have also been extended these privileges. The act covers railroad and terminal company employees and retirees (hereafter referred to as railroad employees unless otherwise noted) who had similar privileges on April 30, 1971, the date before Amtrak assumed rail passenger service from the railroads. As of December 26, 1979, about 1 million people were eligible under the act. During 1979 they used Amtrak-issued passes to make about 384,000 trips and travel about 140 million miles. These travelers are referred to as Public Law 92-316 pass riders after the 1972 amendment to the Rail Passenger Service Act that established the benefits.

For the most part, public law pass riders ride free on their home rail lines; that is, the lines of the particular

[1] 45 U.S.C. 565(f).

railroad with which they are or were associated. They travel on the rest of Amtrak's system at half fare.

Amtrak also provides, on its own accord, similar reduced rate transportation privileges to employees of the 16 participating railroads and 13 terminal companies[2] which are not eligible under the Rail Passenger Service Act. These employees and their spouses and dependents can travel at half fare on Amtrak's entire system. They numbered about 171,000 as of December 26, 1979, and are known as non-public-law pass riders when they ride the train. About 87,000 non-public-law pass riders traveled about 21 million miles on Amtrak in 1979. According to Amtrak representatives, these employees were extended reduced rate transportation privileges in 1972 in order to promote ridership, increase revenue, obtain the employees' good will, and meet railroad union requests.

During 1979, public law and non-public-law pass riders totaled 471,000, or about 2.2 percent of Amtrak's ridership. They traveled about 161 million miles.

RAILROAD EMPLOYEES HAVE TRADITIONALLY RIDDEN TRAINS FREE OR AT REDUCED RATES

Railroad employees have been riding passenger trains free or at reduced rates since the 1880s. Before Amtrak took over, the railroads usually allowed all or certain of their employees to travel on their home lines free or at reduced rates. Many railroads also had reciprocal agreements permitting the others' employees to travel at reduced rates, usually half fare. In addition, employees of some freight-only railroads were allowed to ride at reduced rates on passenger service railroads. The terminal companies were also usually included in the pass programs. The railroad pass programs, however, often varied to some extent with regard to eligibility, restrictions, controls, and reciprocal agreements.

[2] The railroads and terminal companies with which Amtrak contracts to operate and maintain its trains.

The railroads and their employees generally considered pass privileges as a gratuity from employer to employee, and the privileges usually were not required by union agreements. The railroads viewed the costs to provide free or reduced rate transportation as insignificant because seats occupied by pass riders would normally have been empty. They did not reimburse each other for pass riders under the reciprocal agreements. (Amtrak pointed out, however, that it does not receive reciprocal benefits from the railroads because it is the sole intercity passenger railroad.)

MANY RAILROAD EMPLOYEES LOST THEIR PASS PRIVILEGES WHEN AMTRAK BEGAN OPERATING

The Rail Passenger Service Act was enacted in October 1970, creating Amtrak as a for-profit corporation to revive the failing intercity passenger train industry and retain a high-quality rail passenger service for the Nation. Amtrak began operations on May 1, 1971, and assumed passenger service from all but five railroads.[1] With Amtrak's takeover of passenger service, many railroad employees lost their free and reduced rate transportation privileges.

In early 1972 Amtrak gave free or reduced rate transportation privileges to participating railroad and terminal company employees and retirees. These priviliges, however, were subject to change or cancellation by Amtrak, and privileges for many railroad employees and retirees were not restored.

PASS PRIVILEGES REESTABLISHED BY LEGISLATION

On June 22, 1972, the Rail Passenger Service Act was amended by Public Law 92-316 to restore free or reduced

[1] The Southern; the Denver and Rio Grande Western; the Chicago, Rock Island and Pacific; the Georgia; and the Canadian Pacific railroads declined to join Amtrak.

rate transportation to all who had such privileges when Amtrak took over rail passenger service. Specifically, the amendment required Amtrak to assure that, to the maximum extent practicable, railroad and terminal company employees, retirees, and their spouses and dependents eligible for free or reduced rate transportation on April 30, 1971, would be eligible to receive, provided space was available, free or reduced rate transportation on any intercity rail passenger service provided by Amtrak on terms similar to those available to them on that date. Amtrak had the authority to adopt the terms of the various railroads or a single systemwide schedule of terms. Amtrak chose the latter. (See p. 6 [page 52 of this Joint Appendix].)

REIMBURSEMENT TO AMTRAK FOR THE PASS PROGRAM

The amendment also provided that the railroads were to reimburse Amtrak for the costs incurred in providing the required free and reduced rate travel, including the cost of implementing and administering the program. Within 90 days each railroad was to enter into a reimbursement agreement with Amtrak. If Amtrak and a railroad could not agree on the railroad's payment, ICC was to decide the payment amount within 90 days after referral. Amtrak and the railroads substantially differed on what the reimbursement should be, and referred the matter to ICC for a decision.

The ICC reimbursement decision

During the ICC deliberations, Amtrak proposed to charge the railroads 8.6 cents per passenger-mile.[1] This amount equaled Amtrak's operating expenses per passenger-mile after being reduced by revenues from non-passenger-carrying activities (mail, express, etc.) and from passenger-carrying activities not covered by pass privileges (sleeping cars, etc.).

[1] A passenger-mile is the term for carrying one passenger one mile.

The railroads estimated that the payment should be 0.867 mill (0.0867 of a cent) per passenger-mile and that this amount should be offset by the reduced rate fares paid by the pass riders. The railroads, however, agreed to pay Amtrak for the pass program's administrative costs.

The railroads contended that Amtrak's costs would be insubstantial. They said that the plain language of the legislation entitles eligible persons to free or reduced rate transportation "provided space is available" after other passengers have been accommodated. The railroads further said that the transportation costs, if any, for which Amtrak was to be reimbursed are only incremental costs, or those added costs incurred solely because of eligible persons occupying available space that otherwise would have been empty, and are to be offset by pass rider-generated revenue. The railroads concluded that Amtrak's proposed rate was ignoring the space available limitation and was charging for pass riders at twice the rate of a regular passenger.

Amtrak stated that the space available criterion could not be used for nonreserved trains, which accounted for about 58 percent of Amtrak's seat-miles.[2] According to Amtrak, the cost of maintaining control over space would be prohibitive, about $42 million per year, and these costs would be reimbursable by the railroads as a cost incurred to implement or administer the legislation.

In December 1972 ICC said it had no doubt that, aside from the costs to implement and administer a pass policy, Amtrak would incur some added transportation costs. ICC concluded, however, that Amtrak's passenger services are operated for the benefit of revenue riders; carrying pass riders is incidental. ICC said it could not assume that added services would be provided for the sole benefit of pass riders and that expenses would vary with the addition of an as yet unknown number of pass riders.

[2] A seat-mile is the term for moving one train seat one mile.

ICC approved an interim reimbursement rate of 0.79 mill per passenger-mile to compensate Amtrak for transporting the pass riders in available space. The 0.79 mill was to be offset by any reduced rate fares paid by pass riders.

As a result of the ICC decision, the railroads reimbursed Amtrak solely for the pass program's administrative costs. The railroads paid nothing for incremental operating costs because the 0.79 mill per passenger-mile was always offset by the pass riders' half fares. ICC left the case open so that the rate could be reconsidered at a future date, but Amtrak was unable to identify and document incremental costs that would exceed the pass riders' half fares.

The 1979 Amtrak Reorganization Act

The Reorganization Act, enacted on September 29, 1979,[1] superseded the ICC decision for the 2-year period beginning October 1, 1979, and required the railroads to reimburse Amtrak for public law pass riders at the rate of 25 percent of the systemwide average monthly yield per passenger-mile during the 2 year period. Amtrak has defined the systemwide average yield as its average revenue from all ticket sales (except commuter tickets and free or reduced rate pass rider tickets) on all of Amtrak's system. The 25-percent reimbursement rate is in lieu of any charges to the railroads for costs incurred by Amtrak to provide the free or reduced rate transportation, and it is not to be offset by the pass riders' half fares.

Based on the new rate, Amtrak is charging the railroads about $820,000 for October, November, and December 1979. This amount was more than the railroads paid Amtrak in all of 1978.

Before the Reorganization Act, the railroads reimbursed Amtrak at the same rate for the public law and

[1] The Amtrak Reorganization Act's effective date is Oct. 1, 1979.

non-public-law pass riders. Amtrak and the railroads did not distinguish between the two groups. However, the 25-percent reimbursement rate established by the Reorganization Act applies only to public law pass riders. Amtrak and the railroads have not agreed on how much the railroads will pay for non-public-law pass riders. Amtrak wanted to apply the 25-percent rate to both, but the railroads were unwilling to pay for the non-public-law pass riders. Amtrak has continued the benefits but has not charged the railroads. Both Amtrak and the railroads anticipate difficulties with the railroad unions if the non-public-law privileges are discontinued.

HOW THE PASS PROGRAM WORKS

Railroad employees, retirees, their spouses, and dependents eligible under the Rail Passenger Service Act are entitled to free or half fare coach transportation on all Amtrak intercity trains except the metroliners. Widows of employees who had 19 years or more service on April 30, 1971, or were retired on that date are also eligible. Pass riders can also upgrade to slumbercoach and sleeping accommodations by paying 50 percent of the regular additional charge for these services. Half fare coach tickets are assessed at one-half the standard one-way fare, excluding all discounts other than children's fares.

Pass riders are eligible for travel on a space available basis; that is, pass riders only take a space on the trains if that space would normally go empty. Currently, Amtrak does not allow pass riders to make reservations more than 24 hours before scheduled train departure times, and they cannot ride the metroliners. However, much of Amtrak's space is unreserved. (See ch. 4 for a further discussion of the space availability criteria.)

Amtrak issues plastic, embossed cards to eligible employees, retirees, and widows. These cards also contain the names of their spouses and dependents. Pass riders submit these cards to authorized ticket agents in order to

obtain tickets. Tickets must be picked up and signed for in person. The pass rider's signature is also required by the conductor/trainman on the train.

As shown by the following table, pass riders' entitlement to free or reduced rate travel depends on length of service on April 30, 1971, whether or not they are retired, and whether they are traveling on or off home lines.

SCHEDULE OF PRIVILEGES

	Unlimited free (note a)	Limited free (note b)	Half fare (note c)
Participating railroad and terminal company *employees* with *19* or more years of continuous service on April 30, 1971, and their:	x		
Widows	x		
Spouses	x		
Dependents		x	
Participating railroad and terminal company *employees* with *9 to 19* years of continuous service on April 30, 1971, and their:	x		
Spouses		x	
Dependents		x	
Participating railroad and terminal company *employees* with *less than 9 years* of continuous service on April 30, 1971, and their:		x	
Spouses			x
Dependents			x
Retirees who on April 30, 1971, were employed by or retired from a *participating* railroad or terminal company and their:	x		
Widows	x		
Spouses	x		
Dependents		x	

	Unlimited free (note a)	Limited free (note b)	Half fare (note c)
Employees and *retirees* of *nonparticipating* railroads and terminal companies who on April 30, 1971, were eligible for free or reduced rate transportation under a policy or agreement in effect with any participating railroad and their:			
Spouses			x
Dependents			x
			x
Employees who were hired after April 30, 1971, and are currently employed by *participating* railroads or terminal companies (non-public-law) and their:			
Spouses			x
Dependents			x
			x

[a] Persons indicated are eligible for free transportation, unlimited as to frequency, on Amtrak trains over the lines of the participating railroad with which the employee or retiree is or was associated (home road or designated home road for terminal company employees and retirees) provided space is available. In addition, they are eligible for reduced rate transportation (one-half of the regular coach fare based on the one-way fare, excluding all discount and promotional fares except children's fares) off the home road to the extent that space is available.

[b] Persons indicated are eligible for free transportation (as defined above) but limited to 12 free round trips per calendar year. In addition, they are eligible for reduced rate transportation off the home road and on the home road after the 12 free trips, to the extent space is available.

[c] Persons indicated are eligible for Amtrak systemwide reduced rate transportation, to the extent space is available.

SCOPE OF STUDY

We examined (1) the history and legislative background of the pass program, (2) Amtrak's pass policies and procedures, (3) eligibility and pass ridership trends, (4) the program's costs and benefits, including who benefits and how and who pays and how much, (5) how the service provided pass riders compares to that provided regular fare-paying passengers, and (6) how much Amtrak should receive for providing the service.

We reviewed Amtrak and ICC records and met with representatives of Amtrak, the Department of Transportation, ICC, the Association of American Railroads, the Air Transport Association, the National Association of Motor Bus Operators, and Greyhound Lines, Inc. We also met with six major railroad companies affected by the new reimbursement rate required by the Amtrak Reorganization Act. These were Consolidated Rail Corporation; Seaboard Coast Line Railroad; Southern Railway System; Burlington Northern, Inc.; Atchison, Topeka and Santa Fe Railroad; and the Chessie System. In addition, we talked to representatives of several railroad employee unions: the United Transportation Union; the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; the International Brotherhood of Electrical Workers; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Railway Labor Executives' Association; and Brotherhood of Maintenance of Way Employees.

We reviewed Amtrak data on pass eligibility, ridership, generated revenues, and costs. We also reviewed ICC's docket file on its 1972 reimbursement rate determination and the legislative history of the statutes establishing the pass program and the recent change in the reimbursement rate. Amtrak's internal audit reports on the effectiveness of its pass controls were also examined. The historical data on pre-Amtrak railroad employee pass

privileges was primarily obtained through the recollections of Amtrak, railroad, and union representatives and by review of the ICC docket file.

CHAPTER 2

PASS ELIGIBILITY, RIDERSHIP, AND REVENUE

In December 1979 over 1.2 million people were eligible for public law and non-public-law pass privileges and could ride Amtrak's trains at free or reduced rates. During 1979 they made about 471,000 trips and traveled 161 million miles. Public law pass riders contributed about $2.5 million in revenue. (Reliable revenue data was not available for non-public-law pass riders.) The number of eligible persons, pass riders, and miles traveled have declined substantially since the beginning of the program in 1972. Revenue has also declined but not as much because fares have increased.

THE NUMBER OF ELIGIBLE PERSONS IS DECLINING

Amendment of the Rail Passenger Service Act in 1972 gave free or reduced rate transportation benefits to about 2.83 million people. There were only 1.05 million eligible in December 1979, a decrease of about 63 percent. The major cause of the decline was employee and retiree deaths. The chart on the next page shows how the number of persons eligible under the Rail Passenger Service Act decreased from December 1977 to December 1979.

Type of passholder	Periods of comparison					
	As of 12-23-77		As of 12-8-78		As of 12-26-79	
	Total persons eligible	Percentage	Total persons eligible	Percentage	Total persons eligible	Percentage
Participating railroad employees:						
Employees with less than 9 yrs. of service on 4-30-71	187,084	16.8	190,671	17.9	179,435	17.2
Employees with 9-19 yrs. of service on 4-30-71	142,753	12.8	144,185	13.6	133,250	12.7
Employees with over 19 years of service on 4-30-71	294,951	26.4	287,463	27.0	239,531	22.9
Widows of the above category employees	227	.1	237	.1	252	.1
Employees on 4-30-71, since retired	106,784	9.6	110,388	10.4	120,140	11.5
Employees retiring on or before 4-30-71	148,232	13.3	107,334	10.0	94,880	9.1
Widows of retirees	53,252	4.8	47,066	4.4	46,876	4.5
Participating terminal company employees	17,177	1.5	16,946	1.6	16,217	1.6
Nonparticipating railroad/terminal company employees	162,757	14.6	160,071	15.0	215,006	20.6
Total	1,113,217*	100.0	1,064,361	100.0	1,045,587*	100.0

* Totals do not equal 100 percent because of rounding.

The number of eligible persons decreased 6.1 percent during the 2-year period, and the decrease is expected to continue. As shown in the chart, retirees and employees with the longest service on April 30, 1971, dominated the total number of eligible persons. Their number should decrease as people die and their children become adults and lose their "dependent" status.

In December 1979 about 435,000 participating railroad employees, retirees, their spouses, and dependents were eligible for unlimited free transportation on their home lines; about 251,000 were eligible for 12 free round trips per year; and the other 344,000 had reduced rate travel privileges. (All trips off the home lines and in excess of the 12 free round trips are at reduced rates.) Another 16,000 eligibles are associated with participating terminal companies. Many of these have free or limited-free home line transportation privileges, but Amtrak's statistics did not identify them separately. Eventually all public law eligibles, except those that are or were associated with nonparticipating railroads or terminal companies, will be eligible for at least limited-free transportation on their home lines, but the total number of eligibles will continue to decline.

The following chart shows that the number of non-public-law eligibles has increased 49 percent the last 2 years.

	Number of persons eligible	Cumulative percent increase
12/23/77	114,490	—
12/08/78	141,899	23.9
12/26/79	170,806	49.2

According to Amtrak's pass bureau chief, several possible factors account for the increase:

—The railroads have hired new employees to replace retirees and to meet additional staffing needs.

—Eligible employees have married.

—Family sizes have increased.

The 56,316 increase in non-public-law eligibles, however, has not been enough to offset the 67,630 decline in public law eligibles during the same period. Under present conditions, the total number of pass riders is also expected to continue to decrease.

PASS RIDERSHIP

Railroad pass riders made up about 2.2 percent of Amtrak's total ridership in 1979. Amtrak carried nearly 21.5 million people and over 471,000 were pass riders. Public law pass riders, who accounted for about 81 percent of the 1979 pass ridership, have been declining. Non-public-law ridership has grown rapidly but is still small compared to public law ridership.

In 1979 pass riders traveled about 161 million miles, a decline of about 66 million from 1976. Ridership should continue to decrease under present conditions, as the number of eligible persons declines.

The following table shows that public law pass ridership dropped substantially—about 37 percent—from 1976 to 1979.

Public Law Pass Ridership
Jan. 1976-Dec. 1979

	1976	1977	1978	1979
Number of pass riders	605,933	541,836	455,590	384,080
Passenger-miles traveled (thousands)	215,940	205,876	173,691	140,297
Average trip length-miles (note a)	356	380	381	365

[a] Computed by dividing passenger-miles traveled into number of riders.

Our analysis of Amtrak's ridership statistics indicated a recent substantial growth in the non-public-law pro-

gram. From 1976 to 1979, the number of non-public-law pass riders more than tripled from 28,413 to 87,238. The passenger-miles traveled almost doubled from 11.3 million to 20.9 million. However, the average trip length declined from 398 miles to 239 miles.

PASS RIDER-CONTRIBUTED REVENUE

In 1979 Amtrak received about $2.5 million in revenue from public law pass riders. This amount was for reduced rate transportation charges, including upgraded accommodations. (Reliable revenue data for non-public-law pass riders was not available.) This amount was a slight decrease from the $2.9 million Amtrak collected in both 1978 and 1977. According to Amtrak's manager of passenger accounting, several fare increases probably contributed to a slower revenue decrease than the decrease in pass riders.

Public law pass riders yield substantially less revenue per passenger-mile than other intercity passengers. For example, the 1979 yield from regular passengers was $0.073 per passenger-mile. The yield for pass riders that year was only $0.018.

Pass riders pay the same as other passengers when they buy food, beverages, liquor, and tobacco. Amtrak did not separately identify how much pass riders spend for food and beverages and other items.

CONCLUSIONS

Public law pass ridership has declined substantially and is expected to continue to decline as eligible railroad employees/retirees die and their dependents grow up. Under present conditions, pass riders will become a smaller and smaller percentage of Amtrak's total ridership, especially if overall ridership continues to go up. The number of non-public-law pass riders has increased but not as much as public law pass riders have decreased.

CHAPTER 3

COSTS AND BENEFITS

Amtrak, the railroads, and the pass riders all benefit from and/or incur costs for the pass program, but we were unable to determine how much because

—many benefits are intangible or difficult to quantify;

—benefits vary from pass rider to pass rider, from railroad to railroad, and from situation to situation; and

—Amtrak's costs of providing transportation to pass riders are debatable.

AMTRAK COSTS AND BENEFITS FOR IMPLEMENTING AND ADMINISTERING THE PASS PROGRAM

Costs

How much it costs Amtrak to carry pass riders is debatable. A widely recognized transportation/economic view is that each passenger—whether a pass rider or not—should be assigned an equal share of the costs of operating a train. In other words, it should make no difference if passengers have first or second priority to board the train because they receive the same basic service on the train. These costs are referred to as fully allocated costs.

Another widely-recognized view is that pass riders travel in a seat or space that would otherwise go empty, and Amtrak incurs only a small additional or incremental cost to transport them. The incremental cost philosophy's basic premise is that providing rail passenger transportation requires large fixed costs, such as the costs for locomotives, cars, and right-of-way, which are incurred whether or not a particular train is full or has empty seats but that some added costs are incurred with each

additional passenger. Examples are fuel for the added weight, additional towels, etc., that may be used and wear on the seat, carpet, and so forth.

During the 1972 ICC reimbursement rate case, Amtrak contended that fully allocated costs would be the most appropriate basis for determining what the railroads should reimburse Amtrak. The railroads, however, argued and ICC agreed that only incremental costs should be considered because Amtrak would incur nearly all its costs without the pass riders. Today, Amtrak and the railroad still differ on what the costs should be.

Fully allocated costs

Although Amtrak has improved its cost/revenue ratio, its costs have substantially exceeded its revenues. Rail passenger service is expensive. In fiscal year 1979 Amtrak's operating costs amounted to about $998.1 million. Amtrak's fiscal year 1979 operating costs and revenue are shown below.

	(000 omitted)	
Revenue:		
Transportation	$321,563	
Food and beverage	26,707	
Mail, express, etc.	12,781	
Other	20,238	$381,289
Direct expenses:		
Train/engine crews	$ 97,719	
Train fuel and power	58,215	
Onboard service-labor	60,953	
Onboard service-supplies	24,890	
Other direct	2,061	243,838
Common expenses (note a):		
Station services	$ 48,628	
Transportation	29,213	
Locomotive maintenance	53,158	
Car maintenance	158,489	
Metroliner maintenance	9,112	
Track-related maintenance	24,521	
Facility-related maintenance	23,817	
Common facilities overhead	111,384	
Other common expenses	97,467	555,789
Other railroad expenses:		
Contract avoidable expense	3,458	
Assumption of liability	1,368	
Allocated performance payments	7,265	12,091
Operating support		44,068
Depreciation, taxes, and insurance		79,664
Corporate general and administrative		15,209
Interest expenses		31,372
Other expenses, including prior period adjustments		16,106
Total expenses		998,137
Net loss		$616,848

[a] Expenses at facilities serving more than one train.

When operating costs are fully allocated to each Amtrak passenger (including pass riders), they amount to about $46.77 per passenger, or 20.3 cents per passenger-mile traveled, during fiscal 1979. On the same basis, each passenger contributed about $17.87, or 7.8 cents per passenger-mile. The net loss per passenger was $28.90, or 12.5 cents per passenger-mile.

Since Amtrak began operations, its costs have substantially exceeded its revenues, and the differences have been made up by Federal subsidies. The Congress and the administration have expressed a desire that Amtrak reduce its need for subsidies. For example, the Amtrak Reorganization Act established an improved ratio of revenues to operating expenses as an Amtrak objective. Specific goals are for Amtrak to cover at least 44 percent of its operating expenses (excluding depreciation) with revenue by the end of fiscal 1982 and 50 percent by fiscal 1985.

Amtrak is responsible for recovering as much of its costs as practicable. Fully allocated costs, however, are probably not a realistic basis to determine how much Amtrak should receive for pass riders. Although costs are

an important consideration, Amtrak's fares for regular passengers are largely based on such factors as competition from other transportation modes and the nature of the particular market being served. As shown earlier, full fare passengers have been paying less than half of what it costs to transport them.

Incremental costs

Before Amtrak took over, the railroads used the incremental cost concept to justify allowing their own employees to ride free or at reduced rates and other railroad employees to ride at reduced rates, when space was available. Other transportation companies such as the airlines have also used this justification. The railroads believe these costs to be insubstantial. For example, during the 1972 reimbursement rate case, the railroads estimated that Amtrak's operating costs to provide transportation to pass riders would be less than one-tenth of a cent per passenger-mile and this would be offset by the pass riders' half fares. ICC provided for a smaller reimbursement rate. (See ch. 1.)

Amtrak has considered the ICC-established reimbursement rate to be too low even for incremental costs, but it has not been able to identify and adequately document incremental costs that would not be offset by the pass riders' half fares. The Congress has also expressed concern that the ICC rate did not adequately reimburse Amtrak. For much of the pass rider travel, Amtrak was not reimbursed at all for the transportation.

If the 0.79 mill rate had been in effect for all of calendar year 1979, the reimbursement would have been about $120,000. But this amount would have been offset by the $2.5 million in pass rider half fares. If the rate was updated for inflation, the reimbursement would have been about $270,000, still substantially less than the offsetting half fares.

The railroads did agree to reimburse Amtrak for the program's administrative costs. For example, in 1978 Amtrak collected $406,000 from the railroads. At the time the Reorganization Act was passed, Amtrak and the railroads were finalizing an agreement for the railroads to pay $610,000 in 1979 administrative costs.

Benefits

Amtrak benefits when it receives revenue from the pass program which it ordinarily would not have obtained. This is the case when a pass rider occupies and pays half fare for a seat that otherwise would have been empty. Pass riders also generate revenue when they use other services such as food and beverages, for which they pay the same as a regular passenger. Of course, much of the passenger-miles traveled by public law pass riders are by those that ride free, and very little revenue is generated.

On the other hand, Amtrak would lose revenue if pass riders ride free or at half fare when they would have been willing to pay the regular fare or if Amtrak could have offered a lesser discount and enticed more people to ride the train. Half fare pass riders pay one-half the cost of a one-way fare without any discounts, except for children's fares. These riders may not have paid full fares for their trips if they did not use their passes because discounted fares such as the 75-percent fare for the elderly and group and excursion fares would be available to them.

Amtrak further benefits when pass riders are employees of participating railroads and are involved in operating Amtrak trains. Free or reduced rate travel can promote good will and morale and allow these employees to see first hand the results of their efforts. In addition, Amtrak benefits when pass riders relate good experiences with train travel to others.

RAILROADS

Before the Reorganization Act, the railroads paid very little for the pass program. Their cost was almost totally Amtrak's administrative costs for the program plus a small amount of administrative costs of their own, such as certifying their employees' eligibility for the pass program. The Reorganization Act, however, substantially increased the railroads' costs. For example, if the 25 percent of average monthly systemwide yield rate were in effect for 1978, the railroads would have paid about $3 million rather than nearly $406,000 in administrative costs. Amtrak's billings to the railroads for the last 3 months of 1979, under the new rate, totaled about $820,000. Over half that amount was billed to Conrail, Burlington Northern, and the Santa Fe.

Railroad representatives—including several vice-presidents, attorneys and rail passenger operations officers—generally told us their companies benefit very little, if any, from the pass program. They further told us that pass privileges are not used in recruiting as an inducement for employment. According to the railroads, many employees seldom use their passes, if at all, nor do they value them very highly. The railroad representatives added that many of the public law pass riders no longer work for the railroads, and they feel no obligation to provide these past employees with free or reduced rate transportation on Amtrak.

The railroads do benefit to the extent that their employees value the passes and attribute them to their employers. Further, railroad employee unions also like to have the passes for their members, and the passes may improve the railroad-union relationship. But these intangible benefits are difficult, if not impossible, to quantify.

PASS RIDERS

There is no question that pass riders benefit from the pass program. They ride the trains free or at substantially reduced rates. The passes have certain restrictions, however, that reduce their value. Because of the restrictions and other discounts available, pass riders may at times decide to become regular passengers.

Eligible persons must use their passes to obtain full benefits. However, some may not use their passes but still value them because they have the opportunity to use them when the need arises.

Much of the travel by pass riders is free. In 1979 public law pass riders traveled about 140 million passenger-miles, of which about 66 million were free coach travel. An additional 12 million miles were traveled by pass riders who paid only half the additional charge over coach fare for upgraded accommodations. The base fare was free. Thus, about 56 percent of the passenger-miles traveled by public law pass riders were by those whose passes exempted them from paying the coach fare. Furthermore, some others traveled free for part of their trip, and paid half fare for the remainder. Amtrak records these riders the same as reduced rate pass riders and does not separately identify the free travel. Non-public-law pass riders rode 21 million passenger-miles during 1979 but all paid half fares. On page 21 [page 69 of this Joint Appendix] are two examples of how eligible persons can receive large discounts by using their passes.

Railroad employee union representatives—including several unions' legislative directors and two vice-presidents—told us that the pass privileges under the Rail Passenger Service Act are benefits that the railroads owe their employees. The representatives said the railroads have historically provided the benefits, and the employees earned the privileges by their years of service to the railroads.

CONCLUSIONS

There is no question that pass riders benefit from the pass program. The railroads benefit when their em-

ployees have a higher morale and better relationship with their employers because of the passes. Amtrak may benefit, but it is uncertain how much. The major questions are (1) how many pass riders would ride Amtrak as regular passengers and pay full fare if they did not have passes and (2) could other passengers be found who are willing to ride at a lesser discount.

Before the 1979 Amtrak Reorganization Act, the railroads paid Amtrak very little for the pass program, but the act substantially increases their contribution. Amtrak's costs to provide transportation to pass riders vary greatly depending on whether fully allocated or incremental costs are considered. The railroads believe Amtrak should be reimbursed only for minor incremental costs, and Amtrak has been unable to identify and adequately document incremental costs that would exceed the pass riders' half fares. Amtrak's fully allocated costs are much larger than what it has received from the railroads and pass riders for the service but are probably not a realistic basis to determine how much Amtrak should be reimbursed. The fares of regular passengers are not based on fully allocated costs but on the value of the service provided. Amtrak recovers less than half of its operating costs from its fares.

Examples of How Railroad Pass riders Receive Substantial Savings From Free or Reduced Rate Transportation

Example A

Husband and wife traveling from Chicago, Illinois, to San Francisco, California, and return, with upgrade accommodations to a one-bedroom.

	Total ticket cost	Discount in dollars	Percentage discount
Railroad pass riders:			
Public law (Burlington Northern retiree) and spouse	$404	$572	59
Non-public-law employee and spouse (note a)	488	488	50
Regular Amtrak passengers:			
Standard fare	976	—	—
Family plan (note b)	820	156	16
Excursion fare plan (note c)	790	186	19
Elderly fare plan (note d)	820	156	16

Example B

Husband and wife traveling from Washington, D.C., to Miami, Florida, and return, with upgrade accommodations to a one-bedroom.

	Total ticket cost	Discount in dollars	Percentage discount
Railroad pass riders:			
Public law employee (Seaboard Coast Line) and spouse	$139	$459	77
Non-public-law employee and spouse	300	298	50
Regular Amtrak Passengers:			
Standard fare	598	—	—
Family plan	504	94	16
Excursion fare plan	486	112	19
Elderly fare plan	504	94	16

[a] The non-public-law cost is the same as a public law pass rider traveling off home lines.

[b] Under this plan, the husband pays the standard fare and his wife only half fare. Travel dates are restricted on many routes.

[c] This fare is good for travel over a 40-day period. Departures are prohibited on certain dates.

[d] The elderly fare gives individuals aged 65 or over a straight 25-percent discount (except for accommodation upgrades), if their ticket is priced over $40.

CHAPTER 4

SPACE AVAILABILITY AND VALUE OF THE SERVICE

The Rail Passenger Service Act specifies that eligible railroad employees are to receive free or reduced rate transportation, provided space is available. Whether space is available and how Amtrak ensures that full fare passengers are accommodated first are the principal limitations on pass riders, and these limitations affect the value of the service they receive.

AMTRAK PASS RESTRICTIONS

Amtrak has the responsibility to select and enforce pass restrictions that assure, to the extent practicable, that pass riders are provided transportation only after full fare passengers are accommodated. These restrictions, which are subject to change at Amtrak's discretion, apply to space availability on both reserved and unreserved accommodations.

On trains with reserved seats or sleeping accommodations, passengers must have advance reservations. For these trains, pass riders are restricted to a 24-hour period prior to train departure time during which they can make advance reservations. (The airlines usually do not allow standby passengers to make reservations.) Amtrak requires no advance reservations and generally does not restrict the pass rider's ability to board unreserved trains, which account for slightly over 50 percent of Amtrak's seat-miles. However, Amtrak policy does require pass riders to give up their seats to full fare passengers if the train fills its seat capacity.

Before a train's departure, there is normally no way to determine how many passengers will actually board the train or if the train will fill beyond its seat capacity. Amtrak's policy is not to oversell reserved seats, but

other factors, such as incorrectly written tickets or an equipment change, can lead to more passengers on board than seats for them to occupy. When more passengers board a train than seats are available, the excess passengers are not put off the train, as would happen on the airlines. The passengers ride standing until space becomes available or they reach their destination.

Pass riders are informed that, as a condition of their passes, they may have to give up their seats or accommodations if such conditions arise. Train conductors are responsible for enforcing these regulations on board by instructing pass riders to stand or move out of upgraded accommodations. Amtrak's ridership and train capacity data indicates the number of standees but does not identify the passengers who had to stand when a train was filled over its seating capacity. Thus, we were unable to determine whether conductors are always enforcing the restriction.

Pass riders also are not put off the train at later points to make room for full fare passengers who may want to board the train. Amtrak's policy is not to bump pass riders because it may place an undue hardship on them. Trains often are not as frequent as air service, and some towns may have train service only once a day or every 2 days. Furthermore, trains often arrive at late hours, and pass riders would be bumped without hotel accommodations. However, conductors are supposed to remove pass riders from sleeping accommodations if full fare passengers want them.

In the past Amtrak has restricted pass riders from certain trains. Presently, they are exempted from the metroliner service.

The pre-Amtrak railroad employee pass program was also considered to be on a space-available basis, but the controls were not strictly standby. The major means to enforce space availability was to restrict pass riders

from the popular and heavily traveled trains. Amtrak estimated in 1972 that controls to ensure that travel is on a space-available basis would cost $42 million.

Amtrak has expressed concern that pass riders have required additional equipment to carry them and have taken the place of potential full revenue passengers. However, empty seats are usually available. If Amtrak is concerned about the effectiveness of its controls, it could take additional steps. For example, pass riders could be excluded from certain trains, or the 24-hour reservation limitation could be changed. In addition, pass riders could be eliminated from ridership and capacity data used in making decisions on equipment needs. More restrictions may be needed if Amtrak's ridership continues to increase.

SPACE AVAILABILITY

Space availability, or whether pass riders can get seats on the trains they want, is a major factor in how valuable free or reduced rate transportation is to pass riders. Although pass riders may face some inconvenience and uncertainty, space is generally available over Amtrak's entire system.

Routes used by pass riders

Pass riders, including Amtrak employees, comprise about 4 percent of total ridership. They are spread throughout Amtrak's system, but long-distance routes are the most popular in total numbers and percentage of pass riders to total passengers. Short-distance routes are the least popular. For example, in fiscal years 1977 and 1978 the percentages of pass riders to total passengers were as follows:

	1977	1978
	(percent)	
Northeast corridor routes	2.5	2.7
Short-distance routes	4.4	3.7
Long-distance routes	8.1	8.0

For Amtrak's 45 routes nationwide we developed pass ridership data for 6 months (every other month) in fiscal year 1979. Six routes had a 10-percent or higher pass ridership. All six were long-distance routes. Two other long-distance routes, a northeast corridor route, and a short-distance route had a pass ridership of over 8 percent.

The number of pass riders during fiscal years 1977 and 1978 was distributed as follows:

	1977	1978
	(percent)	
Northeast corridor routes	31	35
Short-distance routes	17	16
Long-distance routes	52	49

About half of all pass riders traveled the long-distance routes, and less than one in five rode the short-distance routes. In addition, a small number of routes carry a large percentage of pass riders. During our 6-month sample, we found that 10 routes—6 long-distance and 4 northeast corridor routes—had about 55 percent of all pass riders.

Long-distance trains

Pass riders are in greatest evidence in terms of both numbers and percentages on long-distance routes, and these are the trains with the most pass restrictions. Space on most of these trains is all reserved. Long-distance trains are also scheduled less frequently, with some trains departing only 3 days per week. Even with these limitations, high levels of pass riders were able to get on the trains.

Northeast corridor and short-distance trains

Pass riders have a lesser impact on northeast corridor and short-haul routes. While the number of pass riders using northeast corridor trains is high overall, the number of trains on the corridor is greater and schedules more frequent than on long-distance routes. The few short-distance routes which carried high numbers of pass riders also had a higher number and frequency of trains running each day.

Reservation limitations are fewer on pass riders using northeast corridor and short-distance routes. Most trains on these routes were either totally unreserved or a combination of unreserved and reserved. Advance reservation restrictions do not apply to these trains.

Space is usually available for pass riders

In order to determine whether space is available for pass riders on individual trains, we analyzed the peak load statistics for a total of 72 trains on 18 routes. Many of these routes had high levels of total ridership. We found that long-distance and northeast corridor trains had the highest peak loads and would present the most problem for pass riders wanting to get on the train. However, as shown above, long-distance and northeast corridor routes are the most heavily traveled by pass riders. Pass riders want to ride the trains that other passengers do, and they are usually able to do so.

Amtrak maintains peak passenger load statistics which show ridership, including pass riders, at the most crowded points on train routes. Train capacity and ridership levels are counted at certain key points on the route and the percentage load factors are calculated. Amtrak records the peak or highest load factors on the train's route each day and then calculates the train's monthly average peak load. Since only the highest load

points along the route are included in the peak load statistics, an average load factor for all points on the route would probably be lower. Amtrak does not calculate an average load factor for a train's entire run.

From our sample of monthly peak load averages, Amtrak appears to have substantial capacity available, even on routes already carrying high levels of pass riders. Pass riders might encounter difficulty in getting reservations on some all-reserved, long-distance routes which have fewer trains and higher peak loads. Pass riders are entitled to reservations if space is available 24 hours before departure time. Even though a train may be reserved far in advance, Amtrak may cancel advance reservations if tickets are not picked up within a specified time before departure. Amtrak also may have "no shows" for a particular train, opening more opportunities for pass riders to obtain last minute space on all-reserved trains.

In our sample, several northeast corridor and short-distance trains with unreserved space had high peak loads. High peak loads usually present no barriers to pass riders getting on board unreserved trains, however, only in getting and keeping a seat. Pass riders generally have other less crowded trains on those same routes to choose from, if they want to minimize the possibility of not getting a seat or giving up their seat.

Long-distance trains

Reserved trains with high peak loads present the greatest problems for pass riders wanting to travel by train. In our sample, the all-reserved, long-distance trains came closest to this condition. However, even with high levels of pass riders, we found space was still available on most of the 14 long-distance routes we examined. Our analysis showed that during the sample months, only two long-distance routes had trains running regularly with very high peak load factors. These two routes had trains with

several monthly average peak loads over 90 percent and several daily peak loads over capacity. While these statistics show tight space availability at some points on the route, they include pass riders who were already boarded before the peak load point. The pass riders already on board would not be put off the train because it was over capacity.

The other 12 long-distance routes in our sample had only sporadic occurrences of full or overcapacity trains. None of the 34 trains in our 14-route sample had average monthly peak loads over 95 percent of capacity.

Northeast corridor trains

Most routes in the northeast corridor have pass rider percentages of under 3 percent. In terms of volume, however, they have some of the highest numbers of pass riders. High total ridership on corridor trains dilutes the pass rider's impact on route percentages.

In our sample of 20 trains on two corridor routes, we found 8 trains running consistently over capacity at peak load points. However, trains were running at other times on the same route at much lower peak loads. Thus, available capacity remained on the routes even though certain trains were running over capacity at peak times.

Short-distance trains

The 18 trains in our sample of two short-distance routes generally had lower peak loads than trains in our sample of northeast corridor and long-distance routes. Incidents of overcapacity loads were sporadic and limited to specific trains traveling at peak hours. As in the corridor, however, we found other trains with lower peak loads running next to these high peak load trains. The monthly average peak loads of all 18 short-distance trains in our sample were far below capacity. The highest monthly average peak load was 75 percent, and in many months it was below 50 percent.

VALUE OF THE SERVICE

We believe that the value of the service Amtrak provides pass riders is an important factor in deciding what the reimbursement rate should be. However, we could not arrive at a definitive value of the service. The value of service provided regular passengers may be considered to be the amount they are willing to pay for it; that is, the price of the ticket. The value of the service to pass riders probably would be something less because of the restrictions placed on pass riders and the uncertainty about getting on the train they want. However, how much the value would be reduced could vary from pass rider to pass rider and from situation to situation. For example, many pass riders in the northeast corridor have several unreserved trains and more total trains available to them. Pass riders in other geographic locations may have access to a more limited number of trains. Also, some pass riders may care less about the 24-hour reservation limitation imposed on reserved trains. The availability of other transportation would also be a consideration.

Pass riders are receiving a better service under present restrictions than they would if strict standby controls were enforced. The purpose of the space availability criteria, however, is to ensure that pass riders do not increase costs by replacing full fare passengers or requiring additional equipment. We do not believe the purpose is to control the level of service to the pass rider. Furthermore, additional restrictions that may be needed in the future because of increased ridership would lower the value of the service to pass riders. Increased ridership would also reduce the amount of space on the trains, which would reduce the value of the service.

Although Amtrak and the railroads had not placed a specific value on the service to pass riders, Amtrak now receives half fares from all non-public-law pass riders and from public law riders traveling off their home lines.

In addition, Amtrak receives half fares from some pass riders when they travel on their home lines. Before Amtrak took over, the railroads also generally received half fares from other railroads' employees traveling on their lines. If Amtrak had received half fares for all pass rider travel in 1979, it would have received an additional $2.6 million.

CONCLUSIONS

One measure of the passes' value is the service pass riders receive compared to regular fare passengers. Space availability and the restrictions Amtrak uses to ensure that full fare passengers have priority over pass riders are the major limitations on pass holders' use of the privileges.

On most trains space is available, and pass riders on those trains usually are treated the same as regular full fare passengers. However, Amtrak pass restrictions, such as the 24-hour reservation limitation and prohibition from metroliners, and some uncertainty about getting on desired trains reduce the value of the service to pass riders.

We were unable to quantify how the restrictions and uncertainty affect the value of service pass riders receive compared to full fare passengers. The value would vary by pass rider and by situation. Also, changes in space availability or pass restrictions could change the value. Although no specific value was placed on the service, a half fare has traditionally been the charge for railroad employees traveling off their home lines.

CHAPTER 5

MATTERS FOR CONSIDERATION BY THE CONGRESS

The 1972 amendment to the Rail Passenger Service Act that established the pass program also required the railroads to reimburse Amtrak for its costs to implement and administer the program. Amtrak and the railroads have differed substantially on which costs Amtrak should be reimbursed for ever since the program began, and the issue is still unresolved today.

Before Amtrak began operations, the railroads used the concept of incremental costs to justify providing free or reduced rate transportation to their own employees and reduced rate transportation under reciprocal agreements with other railroads. The railroads considered the incremental costs, or the additional costs to transport pass riders in seats that would otherwise go empty, to be minor. Furthermore, they received revenue from the reduced rate riders. The railroads believe that when the Rail Passenger Service Act required Amtrak to provide free or reduced rate travel to eligible railroad employees as the railroads had done, it also recognized the incremental cost of the service, and Amtrak should be reimbursed accordingly.

Amtrak believes it is responsible for recovering as much of its operating costs as practicable and should receive revenue or reimbursement in line with the value of the service it provides. Amtrak does not believe it is obligated to transport other railroads' employees while being reimbursed only for incremental costs, which are small compared to its fully allocated costs.

Amtrak was also unhappy with ICC's decision to allow incremental costs attributable to pass riders to be offset by other pass riders' half fares. The result was that the railroads generally paid nothing for transportation their

employees received, and Amtrak was not reimbursed at all for much of the travel by pass riders. For example, if the 1972 ICC rate of 0.079 cent per passenger-mile had been in effect for all of 1979, Amtrak's incremental costs would have been about $120,000, and this amount would have been completely offset by the $2.5 million in half fares paid by those pass riders who traveled off their home lines. On the other hand, Amtrak would have obtained an additional $2.6 million if it had received an amount equal to half fares for all pass rider travel in 1979.

We could not find adequate analytical evidence to establish whether Amtrak should be reimbursed for the value of the service it provides pass riders or for the incremental cost of providing the service. That choice is a policy decision that the Congress should make.

If the Congress chooses to have Amtrak reimbursed for the value of the service it provides, that value should probably be something less than the fare charged a regular passenger because pass riders are subject to restrictions and uncertainties that do not apply to full fare passengers. The railroads traditionally received (from the pass riders) one-half the standard fare for other railroads' employees, and Amtrak now receives half fare from all non-public-law pass riders and public law pass riders when they travel off their home lines. Amtrak also receives half fares from some pass riders when they travel on their home lines. However, there is no analytical basis to recommend half fare as the value of the service.

ALTERNATIVES FOR THE CONGRESS

Congressional action will be required to decide the issue of reimbursement. We believe two primary options are available:

—Provide for Amtrak to be reimbursed only for the incremental costs of providing free or reduced rate transportation to eligible persons.

—Provide for Amtrak to be reimbursed for the value of the service it provides.

If the Congress decides that Amtrak should be reimbursed only for its incremental costs, it should require ICC to update its 1972 rate determination to reflect inflation and the additional experience Amtrak has gained with the program. The Congress should also inform ICC whether the revenue from the pass riders' reduced rate fares should offset the incremental costs.

If the Congress decides that Amtrak should be reimbursed for the value of the service it provides, it may wish to establish the traditional half fare as the value to be used or establish some other value. The Congress then would have three choices. It could (1) require the railroads to pay all or a portion of the established value, (2) require pass riders to pay the established value for all their travel, or (3) pay for the travel through Federal subsidy.

AMTRAK COMMENTS AND OUR EVALUATION

Amtrak commented that this report clearly sets forth the historical perspective and issues concerning reimbursement to Amtrak for pass riders. According to Amtrak, a pass rider is like any other passenger using its equipment and facilities, and Amtrak should receive reasonable fare and/or other reimbursement for the service it provides.

Amtrak said there is no doubt that pass privileges represent a valuable fringe benefit to the employees and the railroads and for this reason the incremental cost argument is inappropriate. It acknowledged that the railroads did not reimburse each other for pass riders under their past reciprocal agreements but pointed out that

Amtrak does not receive similar reciprocal benefits because it is the only intercity passenger railroad.

Amtrak said the 50-percent reimbursement rate it initially proposed that the railroads pay appeared to be reasonable given the restrictions on pass riders. Amtrak concluded that, given the congressional mandate to increase revenues and to improve its cost-to-revenue ratios, it should be entitled to reimbursement from the railroads at least equivalent to the current 25-percent formula, established by the Congress, which is a significantly larger discount than is offered the general public. (See app. I.)

We did not obtain written comments on our draft report from the numerous railroads and terminal companies, but we did consider their views during our study. As discussed in chapter 3, the railroads generally regard the pass privileges as little, if any, benefit and the present reimbursement rate as too high.

As discussed in this chapter, we did not find adequate anaytical evidence to recommend one position over the other. We believe that the Congress should decide the matter.

APPENDIX I [to the GAO Report]

National Railroad Passenger Corporation
400 North Capitol Street, N.W. Washington, D.C. 20001
Telephone (202) 383-3000

AMTRAK March 11, 1980

Mr. Henry Eschwege,
Director
Community & Economic Development Division
United States General Accounting Office
Washington, DC 20548

Dear Mr. Eschwege:

We have reviewed the GAO report "How Much Should AMTRAK be Reimbursed for Railroad Employees Using Passes to Ride its Trains?" and agree that it clearly sets forth the historical perspective and the issues concerning reimbursement to AMTRAK for pass riders who are employees of railroads and terminals.

Our position on this matter is that AMTRAK is providing a service to employees of the railroads and terminals that benefits the railroads, terminals and the employees of these organizations. From AMTRAK's point of view, a railroad pass rider is another passenger using the equipment and facilities of the Corporation as does every other passenger. As such, AMTRAK should receive reasonable fare and/or other reimbursement for pass riders employed by agencies other than AMTRAK.

We would agree, because of certain restrictions placed on pass holders, that full fare reimbursement is not equitable, for the same reason that we and other transportation modes place restrictions on discount fares.

There is no doubt that pass privileges represent a valuable fringe benefit to the employee and to the railroads.

For that reason we believe the incremental cost argument is inappropriate. AMTRAK proposed to the Congress last year that a fair value would be fifty (50) percent of the systemwide yield. This recognized that even with the fare collected from the passenger (fifty (50) percent off home railroad) AMTRAK would collect only fifty (50) percent from the railroads for travel over the pass rider's home road. This appeared to be a reasonable discount given the restrictions placed on pass riders.

Because of railroad opposition, the Congress reduced the reimbursement to AMTRAK to twenty-five (25) percent of the systemwide yield. This means that AMTRAK provides a seventy-five (75) percent fare discount for pass riders over home railroads and a twenty-five (25) percent discount for travel over other railroads. This is significantly larger than other fare discounts offered the general public.

The draft report mentions the fact that "railroads did not reimburse each other for pass riders under reciprocal agreements" but it does not mention the fact that AMTRAK does not receive any "reciprocal or interline" benefits from the other railroads since we are the sole intercity passenger railroad.

Given the Congressional mandate to AMTRAK to increase revenues and to improve cost to revenue ratios, we believe that AMTRAK should be entitled to reimbursement from railroads at least equivalent to the current formula established by Congress.

Sincerely,

/s/ Alan S. Boyd
ALAN S. BOYD
President

[Exhibit 5 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NATIONAL RAILROAD PASSENGER CORPORATION

Minutes of
Meeting of the Board of Directors
June 24, 1971

A regular meeting of the Board of Directors of NATIONAL RAILROAD PASSENGER CORPORATION was held at 955 L'Enfant Plaza North, S. W., Room 8060, Washington, D. C. on June 24, 1971, at 2:00 p.m.

There were present:

Mrs. Catherine May Bedell, Messrs. Frank S. Besson, Jr., David E. Bradshaw, John J. Gilhooley, David W. Kendall, Roger Lewis, Charles Luna, John P. Olsson, William H. Moore and William J. Quinn

constituting a quorum of the Directors.

Absent:

Louis W. Menk

Also present by invitation was Brian C. Elmer of counsel to the Corporation.

Mr. Lewis acted as Chairman of the meeting; Mr. Elmer acted as Secretary of the meeting.

Approval of Minutes

The minutes of the meeting of the Board of Directors held May 27, 1971 had been previously distributed to all Directors. On motion duly made, seconded and passed the minutes of that meetings were approved.

Approval of Expenditures

In accordance with the policy of the Board of Directors, the Chairman presented a list of bills in excess of

$25,000 for approval. On motion duly made, seconded and passed these bills (Exhibit A) were approved for payment.

Free Transportation

Mr. Moore advised the Board that the Corporation's existing pass policy continued to result in substantial morale problems among employees of Penn Central. There followed a discussion of the pass question and a report by Mr. Kendall on the status of litigation relating to this issue. It was decided that a meeting would be arranged between management for the Corporation, management of Penn Central, one or more of the Penn Central trustees and their counsel to discuss this matter further.

Adjournment

There being no further business, on motion duly made, seconded and passed the meeting was adjourned at 5:00 p.m.

/s/ Brian C. Elmer
BRIAN C. ELMER
Assistant Secretary

[Exhibit 6 of the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NATIONAL RAILROAD PASSENGER CORPORATION

Minutes of
Meeting of the Board of Directors
July 29, 1971

A regular meeting of the Board of Directors of NATIONAL RAILROAD PASSENGER CORPORATION was held at 955 L'Enfant Plaza North, S. W., Room 8060, Washington, D. C. on July 29, 1971, at 2:00 p.m.

There were present:

Messrs. Frank S. Besson, Jr., David E. Bradshaw, John J. Gilhooley, David W. Kendall, Roger Lewis, Charles Luna, Lewis W. Menk, William H. Moore, William J. Quinn and John A. Volpe

constituting all of the Directors.

Also present by invitation were John P. Olsson, Deputy Under Secretary of Transportation and Brian C. Elmer, of counsel to the Corporation.

Mr. Lewis acted as Chairman of the meeting; Mr. Elmer acted as Secretary of the meeting.

Approval of Minutes

The minutes of the meeting of the Board of Directors held June 24, 1971 had been previously distributed to all Directors. On motion duly made, seconded and passed the minutes of that meeting were approved.

Authorization to Invest in Certificates of Deposit

The Chairman advised the Board that, in his opinion, it was advisable for the officers of the Corporation to have flexibility to invest surplus funds of the Corporation in certificates of deposit. Accordingly, on motion duly made, seconded and passed, it was

"RESOLVED, that the President of the Corporation, and such other officer or officers as he may designate, are hereby authorized, for and on behalf of the Corporation, to invest surplus funds of the Corporation in certificates of deposit issued by any bank insured by the Federal Deposit Insurance Corporation and having deposits in excess of $500 million and for such periods of time as they may deem appropriate, provided that such funds are not otherwise prohibited from being used for such purpose by law or other agreement of the Corporation."

Free Transportation

The Chairman reviewed the history of the Corporation's pass policy, as currently reflected in Letter No. 10, and referred to the exchange of correspondence between the Corporation and the Penn Central.

He noted that the railroads, and particularly Penn Central, had expressed the view that the withdrawal of free transportation privileges of employees threatened to produce severe problems for the railroads, which it was felt, would end by being harmful to Amtrak.

A lengthy discussion followed in which the requirement that Amtrak operate on a for-profit philosophy, the impracticability of a pass policy that required employees to declare whether travelling for personal or business reasons, and the over-all difficulties of assuring employee support during a difficult transition were thoroughly explored. As a result, the Board concluded that an exception to the present policy which would offer limited privileges to employees of the operating railroads was highly desirable at the present time but that these privileges should be limited to the employee's home railroad, and that the privilege itself should be eliminated as soon as possible. It was felt that these objectives could best be realized by limiting the privilege to employees of the operating railroads for use on their home railroad and who

were full time employees of that railroad prior to May 1, 1971, thus permitting the gradual elimination of the privilege through attrition. Accordingly, on motion duly made by Mr. Luna, seconded by Mr. Bradshaw, and unanimously adopted (Messrs. Menk, Moore and Quinn abstaining), it was

"RESOLVED, that the current pass policy of the Corporation, as expressed in Letter No. 10, be modified to permit free transportation of persons who were employed by an operating railroad on April 30, 1971, while such persons are travelling on the railroad which employs them."

Adjournment

There being no further business, on motion duly made, seconded and passed, the meeting was adjourned at 4:30 p.m.

/s/ Brian C. Elmer
BRIAN C. ELMER
Assistant Secretary

[Exhibit 7 to the affidavit of Roger Lewis filed in Support of Defendant's Cross-Motion for Summary Judgment]

ASSOCIATION OF
AMERICAN RAILROADS

American Railroads Building • Washington, D.C. 20036

I. SEWELL MORRIS
Vice President—
Assistant to President

June 10, 1971

Dear Frank:

Per your request, a survey has been made primarily of a number of roads under contract to AMTRAK concerning their pass policies prior to May 1, 1971, the date AMTRAK commenced operations.

It was initially hoped that those policies could be laid out in chart form. However, they varied in so many details that a summary-type analysis was determined to be more feasible.

I—THE FOLLOWING IS A SUMMARY OF THE MAJOR PASS POLICY PROVISIONS:

1) Most roads authorized annual passes over their home roads to employees and dependents based primarily upon length of service of the employee, varying usually in periods of service from 5 to 10 years or more.

2) Generally pass privileges to retired employees and dependents were extended on the same basis as existed at time of retirement of the employee.

3) Trip passes were generally extended to employees and their dependents, in which short periods of service were involved, and for which annual passes were not authorized.

4) Restrictions were often imposed to limit use of passes, either annual, trip or ½ fare, on certain trains.

5) One-half rate orders were frequently authorized on a reciprocity basis for personal travel by employees below title of Vice President.

6) Annual and/or lifetime passes on a reciprocity basis, with some exceptions, were usually only extended to personnel with title of vice president or higher and their dependents.

7) Passes of varying privilege were extended by many roads to a variety of non-railroad personnel, but there was a definite accelerating trend to restrict or eliminate that type of privilege.

II—PROVISIONS OF LABOR AGREEMENTS AFFECTING PASS PRIVILEGES

1) Some labor contracts contain provisions for certain employees (in some cases dependents, too) to be given free transportation. (Examples: Some contracts specifically provided for that privilege for conductors, telegraphers, agents, electrical workers, etc., and in some instances for their dependents).

2) Most collective bargaining agreements contain rules which provide that employees covered in such agreements, and those dependent upon them for support, will be given the same consideration in granting free transportation as is granted other employees in service. The effect of such rules is the establishment of the principle of "me too"; or "if one category of employees is given a pass privilege, all other employees want that same privilege".

III—ANALYSIS OF THE CURRENT AMTRAK PASS POLICY

1) Transportation is authorized on a ½ fare basis, on a nationwide system basis for both railroad business and for personal travel. Railroad pass policy varied in that business travel was provided on a "free basis" on home roads and in most cases no more than on a ½ fare basis on a reciprocity basis. Personal travel, including dependents, when authorized, was usually confined to home roads. So, while AMTRAK policy, for both railroad business travel, and for personal travel, is authorized on a nationwide basis, a ½ fare is assessed, plus full fare for reserved coach, parlor car or sleeping space.

2) Use of rail transportation for business travel, as on the then "free basis", reported in the April study, except for a couple of roads, was minimal. Hence if the ½ fare assessment were dropped, no significant increase in that type of travel could be expected.

3) Based upon discussions with many railroad people, it is the overwhelming consensus that the ½ fare policy for personal travel, even though it is extended on the nationwide basis, is expensive and beyond the reach of most employees, and particularly retired personnel.

IV—UNOFFICIAL COMMENTS

1) Railroad employees have attached great importance to pass privileges. They have considered them part of their employment privileges and as a fringe benefit and reward for service. Incidentally other modes offer similar inducements for faithful service—the air industry, for example, on a very liberal basis.

2) Accurate records and data are not available to measure the actual use of pass privileges prior to AMTRAK. Most rail representatives indicated that insofar as personal travel was concerned, it was estimated not to exceed 5% of pass privileges outstanding in any one year.

3) Travel by employees on commuter trains carry the vast percentage of railroad employees who travel by train to and from work.

4) Except for commuter travel, one railroad, for example, had restricted travel privileges on a free basis to employees in service prior to a specified date. Many rail representatives express the view this type of policy could be applied on a broader scale.

5) Suggestion was made that if AMTRAK wanted to liberalize its present policy, it might consider "free transportation" to employees on their home road.

6) Other suggestions were made to grant "free transportation" to employees on home roads, with ½ fare provisions over other roads.

7) Suggestion that AMTRAK passes on a systemwide basis to officers of the title of Vice President and above, including dependents, would not involve any substantial travel. It would be more of a complimentary gesture in keeping with custom and tradition.

8) Suggestion was made that any liberalization of the AMTRAK pass policy be on a trial basis to get a measure of travel involved.

9) Suggestion was made that passes only be issued on request. The number of passes outstanding was considered an unmeaningful statistic.

10) Suggestion was made that passes, for personal travel, with exceptions, be issued by AMTRAK roads, pursuant to guidelines established by AMTRAK, on a trip basis, with only so many trips in any calendar year.

I would like to repeat that the suggestions are purely informal and unofficial, given to me by various people, experienced in the pass problem.

If I can be of further help, please advise.

Sincerely,

/s/ Luke

General Frank S. Besson, Jr.
National Rail Passenger Corporation
955 L'Enfant Plaza North, S. W.
ASTROL Building
Washington, D.C. 20024

[Exhibit 9 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NW

NORFOLK AND WESTERN RAILWAY COMPANY
Roanoke, Virginia 24011

October 7, 1971

Robert B. Claytor
Executive Vice President

Mr. Roger Lewis
President
National Railroad Passenger Corporation
955 L'Enfant Plaza, S. W.
Washington, D.C. 20024

Dear Mr. Lewis:

I am writing you with regard to Amtrak's policy of free and reduced rate transportation insofar as it pertains to Norfolk and Western Railway Company, which is a participating railroad in Amtrak even though, as you know, Amtrak has not elected to operate any trains over our line.

I have seen a copy of Amtrak's Executive Memorandum No. 71-18, dated September 17, 1971, which I understand is the most recent statement of policy with respect to free and reduced rate transportation. This memorandum provides for the issuance of reduced rate transportation to "participating railroads" but thereafter defines this term as including only those railroads "operating passenger trains pursuant to a contract with Amtrak." These railroads are thereafter listed and, as you know, the list does not include Norfolk and Western.

It seems to me that this memorandum which excludes Norfolk and Western employees from obtaining reduced rate transportation on Amtrak trains is discriminatory,

unfair and apparently contrary to the policy which Amtrak directors have adopted. Norfolk and Western has elected to join Amtrak at a cost of some $6 million. We have cooperated with Amtrak in every way possible, including the sale to Amtrak of some 16 coaches and spare parts therefor at a total price of only $62,000. This passenger equipment was all in first-class condition and included three dome coaches. In return, we would ask that our employees have the same right to reduced rate transportation as other Amtrak lines.

Recently, Mr. W. H. Moore, President of Penn Central, informed me that several weeks ago the directors of Amtrak adopted a general policy as to free and reduced rate transportation, which purportedly has been implemented by the September 17 memorandum. From this conversation, I gathered that it was the intention of the directors that the employees of all railroads which have joined the Amtrak system should be entitled to the same treatment as to reduced rate transportation, regardless of whether Amtrak elected to operate a train over the involved line. If this is correct, the September 17 memorandum is patently in error.

I would appreciate your reviewing this matter and letting me know whether in view of these circumstances you agree that Norfolk and Western employees should be afforded reduced rate transportation. If you do not concur, I would appreciate your bringing this matter before the Amtrak Board for clarification.

Yours very truly,

/s/ Robert B. Claytor
ROBERT B. CLAYTOR

ccs: Messrs. William H. Moore
William J. Quinn
Louis W. Menk

[Exhibit 10 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NATIONAL RAILROAD PASSENGER CORPORATION
955 L'Enfant Plaza North, S.W.
Washington, D.C. 20024

Telephone (202) 554-5700

October 15, 1971

AMTRAK

Dear Mr. Claytor:

Thank you for your letter of October 7th concerning our pass policy. I appreciate the difficulties this must be causing you and welcome an opportunity to comment on the points you raise.

The 1970 Act creating AMTRAK requires us to operate a basic nationwide intercity passenger service designated by the Secretary of Transportation; to improve and modernize railroad passenger service; and to do this at a profit.

Railroads were given an opportunity to withdraw from passenger service by payments based on 1969 losses and AMTRAK has purchased a limited number of passenger cars from the large number available. We do not, however, believe that agreements of this kind should determine our pass policy.

You can get some idea of our problem from the fact that there were on May 1st an estimated 1,400,000 passes outstanding throughout the country. I think you can also appreciate the impossibility of explaining to Congress a costly extension of privilege for which there is no consideration while asking for public funds to cover substantial operating deficits which we will have to do.

This matter received the closest attention from the Incorporators before May 1st and the Board subse-

quently and it was felt that while we could justify reduced rate transportation to employees, dependents and retirees of AMTRAK, the railroads and the terminal companies which actually performed passenger service operations for AMTRAK, we could not continue or extend the same privileges to individuals or groups not performing such services on a regular basis for us. We had to draw a line somewhere and this seemed most reasonable to us.

I am sorry that I cannot respond to your letter in a more helpful or even hopeful manner but this is a very difficult situation for us as well and we feel we have very little latitude with respect to the basic question.

I will, of course, report your letter to the Board at our next meeting as you request. For your information, I am enclosing a copy of our policy, revised as of October 1, 1971.

Very truly yours,

ROGER LEWIS
President

Mr. Robert B. Claytor
Executive Vice President
Norfolk and Western Railway Company
Roanoke, Virginia 24011

Enclosure

Copy for Mr. Medvecky

[Exhibit 11 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

Amtrak Fiscal Year 1980 Authorization and Amtrak Route Restructuring: Hearings Before the House Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 244-46 (1979) (Statement of Richard K. Knowlton, Vice President—Law, Atchison, Topeka & Santa Fe Railway Co.)

---

* * * *

Mr. FLORIO. Mr. Knowlton, what percentage of cost does that represent? That is, the old figure, and the proposed new figure?

Mr. KNOWLTON. The old figure of $500,000 represents approximately 10 percent of the average revenues received by Amtrak, slightly less than 1 cent. The new figure represents 4.5 cents per mile for every free or reduced-rate passenger. Based on the Amtrak figures on passenger riders, that would amount to $7.7 million a year, as compared to the actual costs which we now pay of slightly over $500,000 a year.

* * * *

Mr. FLORIO. Mr. Knowlton, certainly, things have changed rather substantially since Amtrak first went into business and these understandings were arrived at. The very concept of Amtrak being a profit operation is now dissipated legally as well as in terms of common sense.

Mr. KNOWLTON. That is correct, Mr. Chairman.

Mr. FLORIO. My recollection is that Amtrak was receiving revenues as a proportion of costs, approximately at the ratio of 50 percent of revenues. The ratio is now down to about 37 percent in which 37 cents is supplied by the passenger while the balance is supplied by the taxpayer.

Mr. KNOWLTON. That is correct.

Mr. FLORIO. Well, if that is the case, then I am not sure how you can justify saying that $500,000 pays the cost of transporting these railroad employees over the Amtrak system.

Mr. KNOWLTON. The $500,000, Mr. Chairman, is determined pursuant to the present bill, and it is the determination of the actual cost incurred for the incremental transportation provided. It is determined in two ways. Amtrak and the railroads have contracted by which the railroads pay the full actual cost incurred by Amtrak in implementing the program. Amtrak and the railroads went to the Interstate Commerce Commission and asked it to determine the cost of transporting these persons, these free and reduced-rate pass holders on the trains. The Commission determined a mileage figure for that. That has been paid.

• • • •

Mr. FLORIO. Well, I am suggesting that Congress has obviously given some serious consideration to modifying those rules, or that former agreement, under the circumstances. It is fairly clear that you are saying that you do not agree with this change of policy.

All I am saying is that it seems somewhat difficult to accept railroad employees riding for virtually free, which is about what $500,000 represents in terms of the cost of transporting those employees over the lines, if, in fact, the taxpayers are paying $2 for every $1 of the general passenger public.

Mr. KNOWLTON. That is the cost that Amtrak incurs in transporting these employees because, these employees move as space-available passengers.

Now, Mr. Chairman, I think we have a little disagreement on one point, and that is that it is Congress which has prescribed that these employees shall have pass rights.

Mr. FLORIO. Congress does not always do the right thing, and I think that it is time to reevaluate this policy.

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

INTERVENOR-DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Intervenor-defendant United States of America ("United States") hereby moves pursuant to Rules 12(b)(1) and 12(b)(6), F.R.Civ.P., that this Court enter an order dismissing this action upon the grounds that plaintiffs lack standing to challenge the constitutionality of Public Law 92-316 and that plaintiffs' challenges to the constitutionality of Public Law 92-316 and Public Law 96-73 fail to state any claim upon which relief can be granted.

Alternatively, the United States moves pursuant to Rule 56(b), F.R.Civ.P., that this Court enter summary judgment in its favor. There is no genuine issue as to any material fact and the United States is entitled to judgment as a matter of law because: (1) plaintiffs lack standing to challenge the constitutionality of Public Law 92-316; and (2) both Public Law 92-316 and Public Law 96-73 are constitutional.

A memorandum in support of this motion is submitted herewith.

[Signatures Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

FIRST AMENDMENT TO COMPLAINT

The Complaint in this action is hereby amended as follows:

1. The following allegations are added to paragraph 11 of Count I of the Complaint:

> "On August 13, 1981, Section 405(f) of the Act was further amended by Section 1184 of Public Law No. 97-35 ("P.L. 97-35"), 95 Stat. 697, to delete the two-year time limitation applicable to the reimbursement requirement set forth in P.L. 96-73. Whenever P.L. 96-73 or Section 405(f) of the Act is hereafter referred to in this Complaint, such reference shall include the amendment made by P.L. 97-35."

2. The remaining paragraphs of the Complaint which incorporate by reference the allegations of paragraph 11 of Count I shall also incorporate by reference the foregoing additional allegations of such paragraph.

[Signatures Omitted in Printing]

APPELLEE'S

BRIEF

CORRECTED COPY

Nos. 83-1492 and 83-1633

Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL RAILROAD PASSENGER CORPORATION, APPELLANT

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL., CROSS-APPELLANTS

v.

NATIONAL RAILROAD PASSENGER CORPORATION

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS APPELLEE SUPPORTING THE NATIONAL RAILROAD PASSENGER CORPORATION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

45pp

QUESTIONS PRESENTED

1. Whether a railroad that was relieved, under the Rail Passenger Service Act (RPSA), 45 U.S.C. 561(a), of "its responsibilities as a common carrier of passengers by rail in intercity rail passenger service," thereby obtained a contractual right against being required to reimburse Amtrak for free or reduced-fare transportation furnished to the railroads' present and retired employees and their dependents (No. 83-1492).

2. Whether such a railroad has a contractual right against being required to subsidize Amtrak and whether the reimbursement formula in 45 U.S.C. 545(f) impairs such a right (No. 83-1633).

3. If 45 U.S.C. 545(f) impairs any such rights, whether the Due Process Clause is violated.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1492

NATIONAL RAILROAD PASSENGER CORPORATION, APPELLANT

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL.

No. 83-1633

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL., CROSS-APPELLANTS

v.

NATIONAL RAILROAD PASSENGER CORPORATION

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS APPELLEE SUPPORTING THE NATIONAL RAILROAD PASSENGER CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-10a)[1] is reported at 723 F.2d 1298. The decision of the district court (J.S. App. 11a-27a) is unreported.

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[1] "J.S. App." refers to the appendix to the jurisdictional statement in No. 83-1492.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on December 13, 1983. On January 10, 1984, the National Railroad Passenger Corporation (Amtrak) filed a notice of appeal to this Court (J.S. App. 31a-32a).[2] On March 9, 1984, Amtrak filed its jurisdictional statement (No. 83-1492). This Court noted probable jurisdiction on October 1, 1984. Jurisdiction of this appeal is invoked under 28 U.S.C. 1252.

On April 6, 1984, appellees Atchison, Topeka and Santa Fe Railroad, et al. (the railroads) filed a notice of cross-appeal. On April 6, 1984, the railroads filed a jurisdiction statement on cross-appeal (No. 83-1633). Jurisdiction was invoked under 28 U.S.C. 1252. In response, Amtrak and the United States agreed that if this Court noted probable jurisdiction of Amtrak's appeal, the Court should do so for the railroads' cross-appeal as well. On October 1, 1984, this Court deferred consideration of the question of jurisdiction with respect to the railroads' cross-appeal until consideration of the case on the merits.

We see no jurisdictional defect in the cross-appeal. After Amtrak appealed to this Court under 28 U.S.C. 1252, any subsequent appeal or cross-appeal had to be taken to this Court as well. See *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 9; *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983), slip op. 2 n.3. Moreover, since

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[2] The United States also filed a notice of appeal from the judgment of the court of appeals (J.S. App. 31a-32a). However, the Solicitor General decided not to docket a separate appeal but instead to participate as an appellee in support of Amtrak.

cross-appellant seeks relief broader than that granted by the court of appeals' judgment (see 83-1633 J.S. 7), cross-appeal was proper.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Rail Passenger Service Act, 45 U.S.C. 501 *et seq.*, are set out at J.S. App. 40a-45a.

STATEMENT

1. The Rail Passenger Service Act (RPSA or the Act), 45 U.S.C. 501 *et seq.*, took effect on May 1, 1971. Before then, numerous private railroad companies, including all of the railroads in this case, provided intercity rail passenger service in the United States. GAO, Comptroller General, *Nos. B-196907, CED-80-83, Report to the Congress*, "How Much Should Amtrak Be Reimbursed For Railroad Employees Using Passes to Ride Its Trains?," at 2 (Mar. 28, 1980) [hereinafter cited as GAO Report]. Beginning in the 1880s, many railroads permitted current and retired employees and their dependents to travel on their passenger trains free or at reduced rates. *Ibid.* Many railroads also had reciprocal agreements allowing employees to travel on other railroads at reduced rates, usually half fare. *Ibid.*

By 1970, the railroads were losing huge sums as a result of their obligation to provide intercity passenger service, and many had petitioned the Interstate Commerce Commission for permission to discontinue passenger trains. H.R. Rep. 91-1580, 91st Cong., 2d Sess. 2 (1970). Congress responded to this crisis by enacting the RPSA. The RPSA established Amtrak as a for-profit corporation to provide intercity passenger service (45 U.S.C. 541). The RPSA also established a procedure under which railroads could obtain relief from their passenger service obligations—relief that previously was available

only by petitioning the ICC (49 U.S.C. (1970 ed.) 1 (18)). Under the new procedure, the railroads relinquished their passenger routes in order to enable Amtrak "to undertake passenger service on a timely basis" (45 U.S.C. 561(a)). The railroads were also required to pay Amtrak an amount equal to one-half their financial losses from intercity passenger service during 1969 (45 U.S.C. 561(a)(2)) and to provide Amtrak with services and the use of tracks and other facilities at rates to be agreed upon by the parties or, in the event of disagreement, by the ICC (45 U.S.C. 561(a)-(c)).

Pursuant to Section 401 of the RPSA, 45 U.S.C. 561, most of the railroads that had previously provided intercity rail passenger service (including all of the railroads involved in this case) entered into standardized contracts, called "Basic Agreements," with Amtrak. See *The National Railroad Passenger Corporation Agreement* (Apr. 16, 1971) [hereinafter cited as Basic Agreement]. Section 2.1 of the Basic Agreement, entitled "Relief from Responsibility," reflects the release of the railroads from their former obligation to provide intercity rail passenger service.[3]

[3] Section 2.1 provides:

> From and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service. Railroad shall not, without the prior written consent of [Amtrak], operate or provide any regularly scheduled Intercity Rail Passenger Service except pursuant to and in accordance with this Agreement.
>
> If, having fully complied with the notice or other provisions of Section 401(a)(1) of the Act, Railroad is required, because of any order of any Federal, State or local court or agency of government, whether or not such order is lawfully issued, to continue or resume operation of any Intercity Rail Passenger Train beyond April 30, 1971, [Amtrak] and Railroad will cooperate in efforts to effectuate discontinuance thereof.

The Basic Agreements mirrored the RPSA in numerous other respects, imposing upon the railroads significant responsibilities incidental to the provision of intercity rail passenger service. Like Section 402 of the RPSA, 45 U.S.C. 562, Articles 3 and 4 of the Basic Agreements required the railroads to make services, tracks, and facilities available to Amtrak. And like Section 405 of the RPSA, 45 U.S.C. 565, Section 7.3 of the Basic Agreements required the railraods to protect employees who might subsequently be affected by a discontinuance of passenger service.

Section 7.5 of the Basic Agreements deals with transportation privileges. The fifth paragraph, which concerns pass rider benefits, states:

> Transportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak].

Unlike the previous paragraph of Section 7.5, this paragraph does not specify which party is to bear the cost of pass rider transportation.

When Amtrak came into being, it decided for reasons of economy to adopt a pass rider policy more restrictive than that which the railroads had employed. As a result, many railroad employees lost their pass privileges.[4] Later in 1971, Amtrak adopted a less restrictive pass rider policy but did not restore many of the pass rider benefits that had previously been cancelled. GAO Report 3. Moreover, the new policy was subject to change or cancellation by Amtrak. *Ibid.*

The railroads vigorously protested Amtrak's actions. Noting that railroad employees attached

[4] Exhibit 4 to Amtrak's Motion for Summary Judgment, Docket Item No. 86.

great importance to their pass rider benefits, the railroads expressed concern about substantial morale problems and the possibility of strikes. Employees of the Penn Central Railroad threatened to strike over the issue of pass rider service.[5] This threat was sufficiently serious for a federal court to issue a temporary restraining order. *Baker* v. *System Federation No. 1*, 331 F. Supp. 1363, 1364-1365 (E.D. Pa. 1971).

In 1972, Congress determined that the railroads' pass rider policies should be reinstated. The Senate Committee Report accompanying the proposed pass rider legislation stated (S. Rep. 92-756, 92d Cong., 2d Sess. 11 (1972)):

> The Committee believes that employees who were entitled to free or reduced-rate transportation before the advent of Amtrak should not lose such privileges on account of the transfer of passenger service from the railroads to Amtrak.

Similarly, the House Committee Report observed (H.R. Rep. 92-905, 92d Cong., 2d Sess. 11 (1972)):

> Railroads have traditionally offered employees some form of free or reduced fares, both "on line" and "off line." This section requires Amtrak to continue the tradition of according transportation service to railroad employees to the maximum extent practicable.

In order to restore the pass rider benefits, Congress added Section 405(f) to the RPSA (45 U.S.C. 565(f)). Pub. L. No. 92-316, § 8, 86 Stat. 230. Sec-

[5] Lewis Aff. ¶¶ 4-5, 7-8; Amtrak's Motion for Summary Judgment, Exhs. 5-7 & 9.

tion 405(f) required Amtrak to assure, to the maximum extent practicable, that pass rider privileges were preserved for all railroad employees, retirees, and their dependents who had been eligible for such benefits when Amtrak assumed operation of the passenger lines on April 30, 1971. In floor debates on this legislation, Senator Church stated that "the loss of, or reduction of, free pass privileges by railroad employes entitled to them was a breach of faith with these people." 118 Cong. Rec. 14792 (1972). Senator Percy stated that the railroads "must also deliver on their promises of long standing" (*id.* at 14791).

Amtrak implemented this program by permitting pass riders to "travel free or at half fare depending on factors such as length of railroad employment, whether they are retired, and whether they are traveling on or off the rail lines of their home railroads." GAO Report i. Pass riders may not use metroliners, may not make reservations on reserved trains until 24 hours before departure, and once on board unreserved trains, "pass riders are supposed to stand if there are not enough seats." *Ibid.*

As originally enacted, Section 405(f) also required the railroads to reimburse Amtrak for "such costs as may be incurred" in providing the pass rider benefits. Pub. L. No. 92-316, § 8, 86 Stat. 230. The Senate Committee explained (S. Rep. 92-756, *supra*, at 11):

> Because Congress is merely continuing pass policies which the railroads themselves developed, it would appear that the railroads and not Amtrak should bear the cost, if any.

Section 405(f) did not specify how these costs were to be calculated but provided for the matter to

be referred to the ICC if Amtrak and the railroads were unable to reach agreement. Pub. L. No. 92-316, § 8, 86 Stat. 230. When the matter was subsequently referred to the ICC pursuant to this provision, the ICC required the railroads as an interim tive costs of operating the pass rider program. *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act, As Amended*, 347 I.C.C. 325 (1972); J.A. 23-37. The ICC recognized that honoring the pass privileges might result in some substantial costs for Amtrak. The Commission noted (347 I.C.C. at 332; J.A. 34) that reservations made by pass riders might " 'block' potential full revenue passengers." The Commission also noted (347 I.C.C. at 333; J.A. 34) that "[t]here is no suggestion in the record as to how the space-available limitation can be enforced on • • • non-reserved trains, short of excluding pass riders from using them." Observing that the data before it were "not as reliable as is ordinarily desirable," the Commission approved "an interim payment of 0.79 cents per passenger-mile" subject to "possible adjustment in the future, perhaps with an effect retroactive to the date of this decision" (347 I.C.C. at 333-335; J.A. 36). The ICC also specified that such payments were to be offset by reduced-rate fares paid by pass riders (347 I.C.C. at 334; J.A. 36). When this formula was applied, the amount of the reduced-rate fares paid by the pass riders always exceeded, and thus fully offset, the payments otherwise due from the railroads. GAO Report 5.

In 1979, Congress determined that the reimbursement received by Amtrak for pass rider service was not adequate. Congressman Florio, sponsor of the pass rider legislation during that session, said that

he found it "somewhat difficult to accept railroad employees riding for virtually free • • • if, in fact, the taxpayers are paying $2 for every $1 of the general passenger public." *Amtrak Fiscal Year 1980 Authorization and Amtrak Route Restructuring: Hearings on H. Res. 93, 97, 105, et al. Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 244-246 (1979).

In the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, § 120, 93 Stat. 547, therefore, Congress amended Section 405(f) to require the railroads prospectively to reimburse Amtrak for pass rider service at the rate of "25 percent of the systemwide average monthly yield per revenue passenger mile" (*i.e.*, approximately one-fourth of the normal fares for ticket-buying passengers). The new rate was to remain in effect for a two-year period. The Act also directed the Comptroller General to conduct a study and make recommendations concerning the appropriate method of reimbursement.

In 1980, the Comptroller General submitted his report to Congress. The report analyzed in detail two methods of reimbursement: first, reimbursement to Amtrak for the administrative costs of providing pass rider service (as the ICC had originally required); and, second, reimbursement to Amtrak for the value of such service (as required by the 1979 Amendment). GAO Report iv. The Comptroller General concluded that it was impossible to determine with precision either the administrative costs to Amtrak of pass rider service or the value to employees of a pass privilege. *Id.* at ii. Further, he advised Congress that he was unable to find "adequate analytical evidence to recommend one position over the other." *Ibid.* Therefore, the Comptroller

General concluded that the choice between the two reimbursement formulas was "a policy decision the Congress should make." *Ibid.*

After receiving the GAO report, Congress once again amended Section 405(f) in 1981 and provided that the 25% reimbursement requirement would remain in effect indefinitely.

2. This case began in 1980 when five railroads (appellees in No. 83-1492 and cross-appellants in No. 83-1633) brought suit against Amtrak in the United States District Court for the Northern District of Illinois, challenging the constitutionality of Section 405(f). The railroads' principal contention was that Section 405(f) impaired a contractual right granted to them by Section 401(a) of the RPSA, 45 U.S.C. 561(a), and their Basic Agreements with Amtrak. The railroads contended that these provisions gave them the contractual right permanently to be relieved from all responsibility for the provision of intercity passenger service. The railroads also argued that even if they had no contractual rights against the United States, "the congressionally ordered transfer of wealth from the railroads to their current and past employees and their families (the pass riders) is a deprivation of property without due process of law, in violation of the Fifth Amendment" (J.S. App. 16a (footnote omitted)). Because the constitutionality of an Act of Congress was drawn in question, the United States intervened as a defendant. See 28 U.S.C. 2403(a).

In November 1982, the district court issued an opinion upholding the statute and dismissing the case (J.S. App. 11a-27a). The court first held that the RPSA itself does not constitute a contract between the United States and the railroads (J.S.

App. 17a). The court noted (*ibid.*) that "[t]he language of the statute * * * is clearly not that of a contract." By contrast, the court assumed (J.S. App. 18a) that the Basic Agreement was a contract between the United States and the railroads, but the court held that Section 405(f) did not impair that contract. The court observed that the Basic Agreement "relieves the railroads from their 'entire *responsibility* for the provision of Intercity Rail Passenger Service'" (J.S. App. 18a, quoting Basic Agreement Section 2.1 (empasis in court's opinion)). The court then noted (J.S. App. 18a) that by the railroads' own admission, they never had a legal or contractual responsibility to provide free or reduced-rate transportation to employees and their families but had instead done so gratuitously. The court further noted (J.S. App. 19a) that another provision of the Basic Agreement (Section 7.5) gave Amtrak the right to determine such transportation privileges.

The court next rejected (J.S. App. 19a-26a) the railroads' substantive due process argument, holding that the railroads had not overcome the heavy presumption of constitutionality that applies to "legislative Acts adjusting the burdens and benefits of economic life" (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)).

Finally, the court (J.S. App. 26a-27a) found no merit in the railroads' claim that the particular reimbursement formula chosen by Congress in the 1979 amendment violates due process by requiring the railroads to pay more than Amtrak's costs. The court held that Congress had acted rationally in choosing a formula based on the value of the pass privileges rather than Amtrak's costs (*ibid.*). The court noted (*ibid.*) that the GAO had reported to

Congress that it "did not find adequate analytical evidence to recommend one position over the other" and that the GAO report had concluded that the choice between a cost or value-based formula was "a policy decision that the Congress should make." GAO Report ii, 30. Relying on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 18-19, the court held that the choice between such formulas does not present a constitutional question (J.S. App. 27a).

3. The court of appeals affirmed in part and reversed in part (J.S. App. 1a-10a). The court agreed (*id.* at 9a) that Section 405(f) is a legitimate exercise of Congress's power under the Commerce Clause. The court also agreed (J.S. App. 4a) that "Congress did not act unconstitutionally in requiring the railroads to reimburse Amtrak for employee pass privileges." The court of appeals noted that Section 405(f) of the RPSA and Section 2.1 of the Basic Agreement state that the railroads are relieved of any "responsibility" for providing intercity railroad passenger service, and the court held that these provisions do not apply to reimbursement for pass rider privileges because the railroads never had a "responsibility" to furnish those privileges.

While the court found that the railroads had no contractual right against compelled reimbursement, the court concluded (J.S. App. 8a) that the railroads did have contractual protection against being required "to finance aspects of [Amtrak's] operations that were once part of the railroads' entire responsibility for the provision of intercity rail passenger service." The court held that the railroads enjoyed this contract right under the Basic Agreement (see J.S. App. 4a, 8a, 10a), and the court found it unnecessary to decide whether Section 401(a) of the RPSA conferred a similar contractual right (J.S. App. 4a).

Having decided that the railroads had a contractual right under the Basic Agreement not to be called upon to finance Amtrak's operations, the court of appeals then held (J.S. App. 8a (footnote omitted)) that Section 405(f) "authorizes Amtrak to breach the basic agreement." Reasoning that "passholders occupy seats that would otherwise be empty" (J.S. App. 10a), the court concluded (*id.* at 8a-10a) that any reimbursement in excess of Amtrak's "costs"—by which the court appears to have meant merely Amtrak's administrative costs in operating the program—would constitute a subsidy or "windfall" for Amtrak. The court therefore held that Section 405(f) violated the Due Process Clause.

4. Amtrak appealed to this Court, contending that the reimbursement formula in Section 405(f) is constitutional (No. 83-1492). The railroads cross-appealed, arguing that required reimbursement under any formula violates due process (No. 83-1633). The United States, which intervened below, is participating in support of Amtrak as an appellee in both cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

For many years, private railroads in this country gratuitously provided their employees and retirees and their dependents with what are known as "pass rider privileges," *i.e.*, the privilege of traveling free or at a reduced fare on the trains of the employer railroad and certain other railroads with which reciprocal arrangements had been made. By 1970, passenger train service had become highly unprofitable. The Rail Passenger Service Act, 45 U.S.C.

501 *et seq.*, gave financially struggling railroads the opportunity to turn over their passenger lines to the National Railroad Passenger Corporation (Amtrak). A railroad choosing to take advantage of the RPSA was "relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service" (45 U.S.C. 561(a)). A participating railroad was also required to enter into an implementing contract (called a "Basic Agreement") with Amtrak. Section 405(f) of the RPSA, 45 U.S.C. 565(f), which was later added and amended, requires Amtrak to honor the pass rider privileges held by the railroads' employees and retirees and their dependents. Section 405(f) also requires the railroads to reimburse Amtrak for approximately one-fourth the ticket price of transportation provided to pass riders.

The railroads involved in this case took advantage of the RSPA to shed their passenger service obligations, while retaining their freight lines. They now claim that the RPSA and their Basic Agreements with Amtrak gave them a contractual right to be free in perpetuity from any attempt by Congress to reimpose any common carrier obligations relating to passenger service. They also assert a contractual right to be free from making any payments that may constitute a subsidy for Amtrak. And they claim that these alleged contract rights protect them from having to make the reimbursements required by Section 405(f). The railroads' claims are devoid of merit.

I.

In the first place, neither the RPSA nor the Basic Agreements gave the railroads a contractual right against reimposition of common carrier obligations relating to passenger service. There is a strong pre-

sumption that statutes do not create contractual obligations that restrict future government action, and this presumption has special force where, as in this case, it is claimed that the government has bartered away a portion of an important sovereign power, such as the power to regulate commerce. Here, it is clear that the RPSA is not a contract. "The language of the statute * * * is clearly not that of a contract," as the district court accurately observed (J.S. App. 17a). Instead, the RPSA merely granted the railroads regulatory relief from some of their common carrier obligations. The railroads obtained the same relief they would have obtained had they successfully petitioned the Interstate Commerce Commission for discontinuance of their passenger service, and such relief would have provided no guarantee against reimposition of passenger service obligations as long as the railroads continued to operate freight lines in interstate commerce.

The Basic Agreement likewise did not give the railroads a contractual right against the reimposition of common carrier obligations. Only the government could conceivably confer such a right, and the government was not a party to the Basic Agreement. Any attempt by private parties to restrict future government action by contract would obviously be ineffectual. The Basic Agreement did not attempt to impose such restrictions but merely stated that the transfer of passenger service obligations from the railroads to Amtrak was the purpose of the agreement and perhaps a condition of its performance.

II.

A. Even if the RPSA or the Basic Agreement gave the railroads contractual rights against the United States, those rights are not violated by Sec-

tion 405(f). At most, a railroad would have a right against reimposition of "its responsibilities as a common carrier of passengers by rail in intercity rail passenger service" (45 U.S.C. 561(a)). In other words, the railroad could not be compelled to resume operation of passenger trains. Such a right would not mean that the railroad could not be required to reimburse Amtrak for the use of pass rider privileges. The difference is as great as the difference between running a railroad and buying someone a ticket.

The railroads' attempt to construe the RPSA more broadly is unpersuasive. Contrary to the railroads' suggestion, the RPSA did not relieve them from the responsibility of doing anything that is related to rail passenger service. On the contrary, the RPSA expressly requires the railroads to assist Amtrak in many ways, such as by providing the use of track, services, and facilities. See 45 U.S.C. 545, 652. All of these measures are far more directly related to common carrier responsibilities than is the reimbursement required by Section 405(f).

Moreover, as both courts below held, even if the railroads were contractually protected against reimposition of passenger service responsibilities, Section 405(f) would be unaffected because providing pass rider benefits was never one of the railroads' legal or contractual responsibilities.

B. The court of appeals held that the railroads have a contractual right against having to subsidize Amtrak and that the reimbursement formula in Section 405(f) violates that right because it requires the railroads to pay more than the incidental costs of allowing the pass riders on board—for example, the

administrative costs of processing the reimbursements. The court of appeals' theory is clearly wrong.

First, as previously discussed, even if the RPSA or the Basic Agreement conferred contract rights binding against the United States, those rights would at most protect the railroads from having to operate passenger trains, not from having to make any payments that might contribute to Amtrak's survival. Moreover, requiring the railroads to pay one-fourth the ticket price does not subsidize Amtrak. Even the full ticket price is not enough to cover Amtrak's costs, since Amtrak has been operating at a loss and has required continual federal subsidies. The court of appeals' conclusion that any reimbursement in excess of incremental costs would be a "windfall" for Amtrak (J.S. App. 9a-10a) was based on the erroneous premise that "passholders occupy seats that would otherwise be empty." In fact, however, some percentage of those seats would be filled because some passholders would undoubtedly purchase full-fare tickets if the pass rider privileges were not available. Estimating the value of the pass rider privileges is difficult in the absence of a market for tickets with comparable restrictions. But as suggested by the Government Accounting Office's detailed study of the question, the rate contained in Section 405(f) is reasonable and fair.

III.

Finally, even if Section 405(f) altered contract rights, it would not offend the Due Process Clause. Federal laws "'adjusting the burdens and benefits of economic life'" violate due process only if "'the legislature has acted in an arbitrary and irrational way.'" *Pension Benefit Guaranty Corp.* v. *R.A. Gray*

& Co., No. 83-245 (June 18, 1984), slip op. 10-11, quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Here, Congress rationally required Amtrak to honor the pass rider privileges of the railroads' employees and retirees and their dependents because the railroads had created an expectation that those privileges would be honored, because labor peace might have otherwise been threatened, and because the railroads themselves strongly urged that the privileges be honored. Congress rationally required the railroads to pay at least part of the cost of the privileges because Congress felt that the railroads were responsible and that the taxpayers should not have to bear the full burden. And Congress rationally concluded, in light of the GAO study, that requiring reimbursement at the rate of approximately one-fourth the ticket price was reasonable and fair to the railroads.

ARGUMENT

SECTION 405(f) OF THE RAIL PASSENGER SERVICE ACT DOES NOT UNCONSTITUTIONALLY IMPAIR ANY CONTRACTUAL RIGHT OF THE RAILROADS

I. THE RAILROADS DO NOT HAVE A CONTRACTUAL RIGHT TO BE FREE OF THEIR PRIOR RESPONSIBILITIES FOR PROVIDING INTERCITY RAILROAD PASSENGER SERVICE

In the lower courts, the railroads argued that both the Rail Passenger Service Act and their Basic Agreement with Amtrak gave them a contractual right to be free of any responsibility related to the provision of intercity railroad passenger service. Disavowing or abandoning any argument based on the Commerce

Clause (see J.S. App. 19a) or the Takings Clause,[6] the railroads conceded that Section 405(f) is constitutional unless they possess such contractual rights. It is clear, however, that neither the RPSA nor the Basic Agreement confers such rights.

A. The RPSA Is Not A Contract

1. The Rail Passenger Service Act, 45 U.S.C. 501 *et seq.*, is a public law designed to provide the American public with a "modern, cost-efficient, and energy-efficient intercity railroad passenger service" (45 U.S.C. 501(a)). It is not a contract between the United States and the railroads or anyone else.

The federal and state governments enter into numerous contracts, but those contracts seldom take the form of statutes. Construing a statute to be a contract often restricts the exercise of legitimate and important governmental powers, and accordingly there is a strong presumption that legislation "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). Accord, *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 387 (1903); *Rector of Christ Church* v. *County of Philadelphia*, 65 U.S. (24 How.) 300, 302 (1860). See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.14 (1977).

This presumption is particularly strong where it is claimed, as it is in the present case, that government has not merely incurred a commercial obligation, such as the payment of money[7] or conveyance of

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[6] See Plaintiffs' Reply Memo. in Support of Motion for Summary Judgment 12 (no Takings Clause issue raised). Nor was any such issue raised on appeal.

[7] See, *e.g.*, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (issuance of bonds); *Perry* v. *United States*, 294

property,[6] but has bartered away important governmental powers. For example, in *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 387 (1903), Justice Holmes, writing for the Court, responded to a claim that a state had incurred a contractual obligation not to tax certain railroads:

> The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefor it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change.

Indeed, there is considerable authority holding that there are certain powers that government cannot restrict by contract. For example, in *Pennsylvania Hospital* v. *City of Philadelphia*, 245 U.S. 20 (1917), a state law was passed that forbade construction of any streets through the grounds of a hospital without its consent. In return, the hospital was required to make certain payments and to furnish ground for designated streets. Nevertheless, this Court held that the city was not barred from condemning part of the

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U.S. 330 (1935) (issuance of bonds); *Lynch* v. *United States*, 292 U.S. 571 (1934) (issuance of War Risk Insurance); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) (employment contract).

[6] See, *e.g.*, *United States* v. *Northern Pacific Ry.*, 256 U.S. 51 (1921) (land grant); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) (land grant).

hospital grounds for a street. The Court wrote (*id.* at 23):

> States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties.

See also, *e.g.*, *Norman* v. *Baltimore & O.R.R.*, 294 U.S. 240, 309-310 (1935); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 436-437 (1934); *Atlantic Coast Line R.R.* v. *City of Goldsboro*, 232 U.S. 548 (1914); *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387 (1892); *Butchers' Union Co.* v. *Crescent City Co.*, 111 U.S. 746 (1884).

2. In the present case, the presumption that a statute does not create contractual rights and obligations has not been overcome. By its terms, the RPSA clearly does not create or speak of a contract between the United States and the railroads. See J.S. App. 17a; compare *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 105 (1938). Instead, the relationship between the United States and the railroads is described in non-contractual terms. Section 401(a), 45 U.S.C. 561(a), states that upon entering into one of the prescribed contracts with Amtrak, a participating railroad "shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service" under the Interstate Commerce Act and any other laws. This is the language of regulation under the Commerce Clause and not the language of contract.

To be sure, there are frequent references in Section 401(a), 45 U.S.C. 561(a), to contracts between the railroads and Amtrak. However, this Court has recognized that legislation establishing the terms on which other parties may execute contracts does not itself constitute a statutory contract but is rather merely a declaration of legislative policy that is subject to revision or repeal in the discretion of the legislature. *Dodge* v. *Board of Education*, 302 U.S. at 79.

Any remaining doubt about the meaning of Section 401(a) is dispelled by Section 301, 45 U.S.C. 541, under which Congress "expressly reserved" its rights to "repeal, alter, or amend [the RPSA] at any time." A "contract" that Congress may unilaterally repeal, alter, or amend at any time is no contract at all.*

This principle was recognized long ago in the *Sinking-Fund Cases*, 99 U.S. 700 (1878), where rail-

* The railroads contend that this section was "intended to insure that Congress could make future modifications in the *corporate charter* of Amtrak without giving rise to an action for impairment of contract by *Amtrak*. It had nothing to do with the separate contractual undertaking between the United States and the railroads pursuant to Section 401(a) and the Basic Agreements." Brief of Appellants in the court of appeals 22 n.20 (emphasis in original). This argument ignores the plain language of the statute and defies common sense. Section 301 speaks of the right to repeal, alter, or amend the Act—not merely Amtrak's corporate charter. Moreover, the railroads' contention would preclude Congress from making any modifications in Amtrak's corporate charter that might have an effect upon the terms of the Basic Agreements. If Congress had intended to so limit its express reservation of a right to "repeal, alter, or amend," it would have chosen far less sweeping language to accomplish such a narrow purpose.

roads challenged an act of Congress that amended prior statutes governing their obligations to the United States on securities issued to aid in the initial construction of the railroads. Rejecting the railroads' claim that the amendment "improperly interfere[d] with vested rights," (*id.* at 719), the Court held that by using "the simple words • • • 'that Congress may at any time alter, amend, and repeal this act,' • • • Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power" (*id.* at 720).

Just such "simple words" were employed by Congress in the Rail Passenger Service Act. They fully authorized and contemplated changes such as the 1979 and 1981 pass rider amendments.

3. In addition to the language of the RPSA, the nature of the contractual right that Congress allegedly bartered away—its power to impose certain common carrier obligations under the Commerce Clause—weighs heavily against the railroads' position. The regulation of interstate commerce is one of Congress's broadest and most important powers, and it should not lightly be presumed that Congress contracted away any portion of this vital authority.

Similarly, the prior regulatory relationship between the government and the railroads and the economic background of the RPSA are incompatible with the railroads' claim that Congress gave them the contractual right to be free of certain common carrier obligations. "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the accept-

ance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss." *Chesapeake & O. Ry.* v. *Public Service Comm'n*, 242 U.S. 603, 607 (1917). A railroad may be compelled, among other things, to continue unprofitable service (see *Hayfield Northern R.R.* v. *Chicago & North Western Transportation Co.*, No. 82-1579 (June 12, 1984), slip op. 4), to construct expensive new facilities (*Atchison Ry.* v. *Railroad Comm'n*, 283 U.S. 380 (1931)); and to undertake new service (*Chesapeake & O. Ry.* v. *Public Service Comm'n*, *supra*).

When the RPSA was enacted in 1970, many of the passenger lines were "operating under heavy and continuing deficits." H.R. Rep. 91-1580, 91st Cong., 2d Sess. 3 (1970). More than one-fifth of the existing passenger trains were the subject of petitions for discontinuance before the Interstate Commerce Commission. *Ibid.* If the RPSA had not been enacted, most of the railroads would have faced bleak prospects. At best, they could have anticipated lengthy, costly, and hotly contested discontinuance proceedings (see *Hayfield Northern R.R.* v. *Chicago & North Western Transportation Co.*, slip op. 4) while losses attributable to passenger service mounted. At worst, discontinuance might have been denied by the ICC. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 406 (1970) (ICC required New Haven Railroad to continue passenger service although "'totally lacking any hope * * * for future survival of this carrier'"); *Penn-Central Merger Cases*, 389 U.S. 486, 507 (1968).

The RPSA gave the railroads the same relief that might have been obtained through discontinuance petitions, but it eliminated the uncertainty and costly delay that would have otherwise occurred. Congress relieved the railroads of the portion of their common carriers obligations relating to passenger service, but the railroads did not obtain any contractual guarantee that Congress, acting under its Commerce Power, would not reimpose all or part of those obligations in the future if the railroads continued to operate freight service in interstate commerce. See *Chesapeake & O. Ry.* v. *Public Service Comm'n*, *supra* (railroad operating freight service may be required to initiate passenger service as well).

In light of the railroads' plight prior to the RPSA, it is far-fetched to suggest that the Act gave them anything other than welcome regulatory relief. One would expect Congress to have acquired some valuable consideration if, as the railroads maintain, Congress gave them the enforceable contractual right to be free in perpetuity from any obligation to provide any passenger service, while at the same time retaining their potentially profitable freight monopolies. In fact, however, the railroads relinquished little. Instead of shouldering huge annual losses resulting from passenger operations, the railroads were required to pay Amtrak an amount equal to 50% of their passenger service deficit during the preceding year, 45 U.S.C. 561(a)(2). This sum was almost certainly less than the loss a railroad would have otherwise occurred during the pendency of discontinuance proceedings. The railroads were also required to provide operational assistance and facilities to Amtrak at rates to be set by contract or, in the case of disagreement, by the ICC (45 U.S.C.

562). This, however, was a normal incident of the railroads' continuing obligations as common carriers. See, *e.g.*, 49 U.S.C. 11101. Finally, the railroads were required to enter into "fair and equitable arrangements to protect the interests of employees * * * affected by a discontinuance of intercity rail passenger service" (45 U.S.C. 565(a)). However, even if the RPSA had not been enacted, similar conditions might well have been attached to certificates allowing abandonment of rail service. *ICC* v. *Railway Labor Ass'n*, 315 U.S. 373 (1942); see 49 U.S.C. 10903(2). In sum, the net effect of the RPSA was to relieve the railroads of an immense and potentially fatal burden more quickly and more cheaply than would otherwise have been possible. On the other side, the federally subsidized National Railroad Passenger Corporation was given the opportunity to run passenger lines that had been—and continue to be—unprofitable. This was no contract but the gratuitous provision of regulatory relief.

B. The Basic Agreement Between Amtrak and the Railroads Did Not Grant the Railroads the Contractual Right to be Free From All Obligation to Provide Passenger Service

Unlike the RPSA, the Basic Agreement is a contract. But it is a contract between the railroads and Amtrak, not the government.[10] Since Amtrak could not possibly bargain away any portion of Congress's Commerce Clause power, any argument that relies solely on the Basic Agreement and not the RPSA faces an immediate (and insurmountable) obstacle.

[10] Amtrak is not even a government agency, but a for-profit corporation that is "not be an agency or establishment of the United States Government" (45 U.S.C. 541).

The railroads tried to circumvent this obstacle in the lower courts by contending that Congress made Amtrak its agent and delegated to Amtrak the authority to confer upon railroads entering into the Basic Agreement the contractual right to be free of any obligation to provide passenger service. See Appellants Brief in the court of appeals 22, 26-28. This fiction, however, adds nothing to an argument based exclusively on the RPSA. Only Congress could conceivably confer a contractual right against the imposition of common carrier obligations. Thus, whether it is claimed that Congress conferred that right directly in the RPSA or indirectly through an agent, the source of the right must ultimately be the RPSA. And as already shown, the RPSA merely extended regulatory relief.

Both of the courts below suggested that the Basic Agreement gave the railroads a contractual right against future passenger service obligations, but the courts' reasoning was flawed. The district court correctly held (J.S. App. 17a) that the RPSA is not a contract but then erroneously stated in dictum that "[t]he Basic Agreement may well constitute a contract between the United States and the railroads." The court reached this conclusion because it believed that the Basic Agreement granted the railroads something—viz., "relie[f] * * * from their responsibility to provide passenger rail service"—"that only the United States, if anyone at all, can offer" (*id.* at 18a (footnote omitted)).

The district court was wrong on several scores. First, the United States was not a party to the Basic Agreement and is therefore not bound by it. Second, while there is no doubt that the railroads were relieved from their passenger service responsibilities, that relief, as previously shown, was furnished by

the RPSA and was provided as a matter of regulatory grace, not contractual right.

The court of appeals took a different but equally erroneous approach. The court found (J.S. App. 8a) that the Basic Agreement gave the railroads contractual protection against having to subsidize Amtrak and reasoned that Section 405(f) "authorizes Amtrak to breach the basic agreement." But the court never explained how Amtrak, by entering into the Basic Agreement, could bargain away Congress's power to enact a statute that the court conceded (J.S. App. 9a) was "a legitimate exercise of the commerce power."

In concluding that the Basic Agreement gave the railroads a contractual right against having to subsidize Amtrak, the court of appeals may have been misled by the language of Section 2.1 of the Basic Agreement, which states in part that "[f]rom and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service." Of course, even if the Basic Agreement had purported to abrogate the railroads' common carrier obligations, it could not possibly have done so. It is apparent, however, that the Basic Agreement did not attempt to exercise such governmental powers but merely stated that the transfer of those obligations from the railroads to Amtrak, which would be provided under the RPSA as a matter of regulatory grace, was the purpose of the Basic Agreement and perhaps a condition of its performance. See Restatement (Second) of Contracts §§ 224-230 (1981). Other language in Section 2.1, which the court of appeals ignored, shows that the contracting parties recognized that only government could lift the railroads' common carrier responsibilities. The second paragraph of Section 2.1 states:

> If, having fully complied with the notice or other provisions of Section 401(a)(1) of the Act, Railroad is required, because of any order of any Federal, State or local court or agency of government, whether or not such order is lawfully issued, to continue or resume operation of any Intercity Rail Passenger Train beyond April 30, 1971, NRPC and Railroad will cooperate in efforts to effectuate discontinuance thereof.

II. EVEN IF THE RAILROADS WERE CONTRACTUALLY RELIEVED OF ANY RESPONSIBILITY FOR THE PROVISION OF PASSENGER RAIL SERVICE, THE PASS RIDER AMENDMENT DOES NOT IMPOSE ANY SUCH OBLIGATION UPON THEM

A. Requiring Payment For the Use of Pass Privileges Does Not Constitute the Reimposition of Common Carrier Obligations

Even if the RPSA or the Basic Agreement gave the railroads contract rights against the United States, those rights have nothing to do with this case. The railroads have taken language from the RPSA and the Basic Agreement out of context and have grossly distorted its meaning. Under the RPSA and the Basic Agreement, a participating railroad was "relieved of all its responsibilities as a common carrier of passengers by rail" under the Interstate Commerce Act and state law (45 U.S.C. 561(a)). Elsewhere, the Act[11] and the Basic Agreement[12] use

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[11] Another portion of Section 401(a), 45 U.S.C. 561(a), speaks of relieving a railroad of "its entire responsibility for the provision of intercity rail passenger service."

[12] Section 2.1 of the Basic Agreement states that a participating railroad is "relieved of its entire responsibility for the provision of Intercity Rail Passenger Service." See J.S. App. 2a.

slightly different language, but the meaning is the same. The railroads no longer had to operate passenger trains and incur the huge resulting losses. This relief had nothing to do with reimbursement for rides taken by pass holders.

In the first place, the railroads in this case have alleged that they never had a contractual or legal "responsibility" to provide free passes or reduced fares for their employees and their dependents. They claim that these benefits were provided gratuitously —like "'Christmas turkey[s],'" as the railroads put it (J.S. App. 18a). For this reason, both of the courts below correctly held that Section 405(f) was not affected by provisions relieving the railroads from "responsibilities" relating to the provision of passenger service.

More fundamentally, requiring the railroads to make reimbursement for the use of pass privileges on Amtrak does not constitute the reimposition of common carrier obligations. Contrary to the railroads' suggestion, the RPSA and the Basic Agreement did not relieve the railroads from the obligation to provide any type or degree of support for passenger operations. Quite to the contrary, Congress explicity imposed upon the railroads various responsibilities relating to the provision of rail passenger service by Amtrak. Contracting railroads must provide Amtrak with equipment, track, personnel, services, and facilities. 45 U.S.C. 545, 562. Congress was particularly concerned that the railroads make "fair and equitable arrangements to protect the interests of employees" who might be adversely affected by a discontinuation of intercity rail passenger service, and Congress therefore specified certain protections and benefits for them. 45 U.S.C. 565(b); Basic Agreement App. C-1. In addition, two years after the Act went into effect, Congress required the contracting railroads to give Amtrak's passenger trains the right of way over their own freight trains in the use of their tracks, junctions, and crossings. 45 U.S.C. 562(e)(1). All of these measures imposed on the railroads responsibilities far more directly and closely connected to the provision of passenger service than is Section 405(f).

Finally, even if the railroads had been relieved of any responsibility even remotely related to *the operation* of passenger trains, Section 405(f) would still not be affected. Paying for someone's train ticket—and that in essence is all that Section 405(f) requires—is a far cry from running or helping to run a passenger railroad.[18]

B. The Reimbursement Formula In 45 U.S.C. 565(f) Does Not Result In a Subsidy Or Windfall For Amtrak

The court of appeals rejected the railroads' claim that reimbursement for pass rider privileges was the same thing as the reimposition of common carrier obligations (J.S. App. 4a, 6a n.4). Instead, the court appears to have begun from the premise that the RPSA and the Basic Agreement protect the rail-

---

[18] As previously explained (pages 26-29, *supra*), we do not see how the Basic Agreement between Amtrak and the railroads may create contractual rights against the United States. But if it does, Section 7.5 of the Basic Agreement refutes any claim that those rights are violated by requiring the railroads to reimburse Amtrak for the use of pass privileges. That provision states that "[t]ransportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak]." And unlike other paragraphs of Section 7.5, this provision does not allocate costs, thus leaving the question open for resolution by subsequent contract or statute.

roads from any requirement to subsidize Amtrak (*id.* at 8a). The court then reasoned that any payment in excess of "the costs of the passes" would constitute a subsidy or a "windfall" for Amtrak (*id.* at 10a). The court defined this "windfall" as the "amount in excess of what the railroads would have expended had they provided the pass privileges" (*ibid.*). The court's reasoning, including its economic theory, does not make sense.

First, the court of appeals' premise was wrong. As previously explained, the RPSA merely relieved the railroads from their common carrier obligation to operate passenger lines, not from any measure that might contribute to Amtrak's financial well-being. If Congress chose to levy a tax on the railroads, while simultaneously subsidizing Amtrak by an equivalent amount, the RPSA and the Basic Agreement would pose no obstacle.

Moreover, there is no basis for the court of appeals' conclusion that the statute requires the railroads to pay Amtrak more than the value of the transportation furnished to pass holders. The court of appeals appears to have concluded (see J.S. App. 10a) that the value of the pass privileges was equal to the incremental costs of allowing the pass riders on board. These costs include such items as the administrative cost of issuing tickets, the extra fuel used as a result of the added weight, additional towels in the lavatory, and wear and tear on the trains' furnishings. See GAO Report 14. The court reasoned that "passholders occupy seats that would otherwise be empty." (J.S. App. 10a). This is clearly not true. If the pass rider privileges were cancelled, some of the pass riders would undoubtedly purchase full-fare tickets. Surely all of them would not stay home or use other forms of transportation.

Determining the true value of the pass rider privileges is not easy. In a free market, the value of the transportation obtained by the pass holders would be the price of a ticket with comparable restrictions. However, railroad passenger transportation is not a free market. It is heavily subsidized by the government, so that even the cost of a full-fare ticket is less than what Amtrak would have to charge if it were economically self-sufficient. In addition, Amtrak does not sell tickets with restrictions comparable to those imposed on pass holders. It is therefore hard to estimate, among other things, how many such tickets could be sold and how many of those tickets would be purchased by persons who now buy regular tickets.

Before amending Section 405(f) in 1981, Congress requested the GAO to determine the value of the pass privileges, but the GAO was unable to arrive at a firm figure. The GAO concluded (GAO Report 27-28):

> [W]e could not arrive at a definitive value of the service. The value of service provided regular passengers may be considered to be the amount they are willing to pay for it; that is, the price of the ticket. The value of the service to pass riders probably would be something less because of the restrictions placed on pass riders and the uncertainty about getting on the train they want. However, how much the value would be reduced could vary from pass rider to pass rider and from situation to situation.
>
> • • • • •
>
> Although Amtrak and the railroads had not placed a specific value on the service to pass riders, Amtrak now receives half fares from all

> non-public-law pass riders and from public law riders traveling off their home lines. In addition, Amtrak receives half fares from some pass riders when they travel on their home lines. Before Amtrak took over, the railroads also generally received half fares from other railroads' employees traveling on their lines.

Like the GAO, the sponsors of the House bill regarding the 1979 amendments to the RPSA felt that it was reasonable to require the railroads to reimburse Amtrak for one-half the price of the transportation furnished to the passholders, and they therefore required reimbursement for 50% of the "system-wide average monthly yield per revenue passenger mile." H.R. Rep. 96-189, 96th Cong., 1st Sess. 48 (1979). In conference, that rate was reduced to the 25% rate in the present statute. H.R. Conf. Rep. 96-481, 96th Cong., 1st Sess. 32-33 (1979). This figure is an eminently fair estimate of the value of the pass rider priveleges and may well be far less than their true worth. It should not have been overturned, especially on the basis of the court of appeals' simplistic economic analysis. Estimating the value of the pass rider privilege is a matter on which Congress and the GAO have far greater expertise than the courts, and their judgments should have been given more respect. Unlike the court of appeals, the district court here correctly declined to second-guess Congress on the particular rate of reimbursement it chose (J.S. App. 27a). As this Court observed in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976), in refusing to overturn Congress's evaluation of an analogous cost issue:

> We are unwilling to assess the wisdom of Congress' chosen scheme * * *. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.

The railroads here ask this Court to "reweigh the evidence and substitute [its] judgment for that of Congress," a task the Court has previously held it "must decline to do." *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976). Accord, *National Ass'n of Greeting Card Publishers* v. *USPS*, No. 81-1304 (June 22, 1983), slip op. 15 (citation omitted) ("'[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.'").

III. SECTION 405(f) IS CONSTITUTIONAL EVEN ASSUMING THAT IT SOMEHOW ALTERS THE RAILROADS' CONTRACTS

Assuming, *arguendo*, that Section 405(f) somehow altered the railroads' contractual rights, due process was not violated. This Court's decision last Term in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.* (*PBGC*), No. 83-245 (June 18, 1984), is completely dispositive of the railroads' due process/contract impairment claim. There, an employer argued that an amendment to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, violated the Due Process Clause because it impaired the employer's rights under a collective bargaining agreement by retroactively imposing financial liability for withdrawing from a multi-employer pension plan. This Court upheld the constitutionality of the amend-

ment on grounds that are fully applicable here. Like the court of appeals' decision in this case (see J.S. App. 9a-10a), the court of appeals' decision in *PBGC* was based on the Seventh Circuit's analysis in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947 (1979), aff'd, 446 U.S. 359 (1980). But the Court in *PBGC* specifically rejected "the constitutional underpinnings" of the Seventh Circuit's analysis in *Nachman* (*PBGC*, slip op. 9 n.6). The *PBGC* Court also made clear (*id.* at 14-15) that principles developed under the Contract Clause may not be mechanically applied when reviewing federal economic legislation under the Due Process Clause:

> We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of preexisting contracts. See, *e.g.*, *Philadelphia, Baltimore & Washington Railroad* v. *Schubert*, 224 U.S. 603 (1912). Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17, n.13 (1977). And, although we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh and oppressive,'" *ibid.* (quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938), and citing *Turner Elkhorn*, *supra*, at 14-20), that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*.

Instead, the Court observed (*PBGC*, slip op. 10) that "[t]he starting point for analysis is [the] decision in *Usery* v. *Turner Elkhorn Mining Co.* [, *supra*]." The Court applied the following standard of review taken from that decision (*PBGC*, slip op. 10-11, quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 15):

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955).

Section 405(f) easily passes this test. Congress clearly was not acting in an "arbitrary or irrational way" when it detemined that the railroads should pay for at least a portion of the value of the free or reduced-rate transportation furnished to their employees and retirees and their dependents. The railroads originally created the expectation that these privileges would be continued, and when Amtrak proposed to curtail them, the railroads strongly opposed such measures, arguing that employee morale and labor peace would be undermined. Amtrak's general passenger service is heavily subsidized by the taxpayers. Thus it was entirely reasonable for Congress to conclude that the railroads should pay for at least a small portion of the pass rider privileges extended at the railroads' request and to satisfy the expectations that the railroads created. The railroads may no longer fear that curtailment of pass privileges will

result in diminished employee morale or labor unrest, since the number of current employees enjoying those privileges has decreased. But that, in our judgment, does not diminish the rationality of the legislation that the railroads themselves once urged upon Congress. The particular reimbursement formula chosen by Congress is also entirely reasonable, as the detailed GAO report and our prior discussion (see pages 32-35, *supra*) show.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys

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APPELLEE'S

BRIEF

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IN THE

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NATIONAL RAILROAD PASSENGER CORPORATION,

Appellant, Cross-Appellee,

v.

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Appellees, Cross-Appellants.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RAILROAD APPELLEES, CROSS-APPELLANTS

HOWARD J. TRIENENS
GEORGE A. PLATZ*
THOMAS W. MERRILL
MARY L. BRICKER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees, Cross-Appellants

Of Counsel:
RICHARD K. KNOWLTON
W. A. BRASHER
THOMAS L. SAMUEL
PAUL A. CONLEY, JR.

December 15, 1984

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED

1. Does the "entire responsibility for the provision of intercity rail passenger service", from which the Railroads were relieved by Section 401(a)(1) of the Rail Passenger Service Act ("RPSA") and contracts entered into by the Railroads and Amtrak thereunder in 1971, include financial responsibility for free and reduced-rate intercity rail passenger service which Congress has subsequently required Amtrak to provide to certain Railroad employees and their dependents, thereby rendering 1979 and 1981 amendments to Section 405(f) of the RPSA, which purport to impose such a financial responsibility on the Railroads, an unconstitutional impairment of the Railroads' contractual rights?

2. Are the 1979 and 1981 amendments to Section 405(f) unconstitutional because (a) they require the Railroads to pay Amtrak amounts in excess of the cost of providing rail passenger service to such employees and dependents, thus impairing the Railroads' release by compelling them to subsidize Amtrak's intercity rail passenger service to the public, and (b) they require the Railroads to pay amounts to Amtrak not reasonably related to the service provided to such employees and dependents?

3. Should the 1979 and 1981 amendments to Section 405(f) be construed so as not to impose any financial responsibility on the Railroads, thereby avoiding any constitutional issue?

The Statement required by Supreme Court Rule 28.1 is set forth at pages 11-15 of the Jurisdictional Statement on Cross Appeal in No. 83-1633.

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---

BRIEF OF RAILROAD APPELLEES, CROSS-APPELLANTS

BASIS FOR JURISDICTION

The judgment of the Court of Appeals to which these appeals relate was entered on December 13, 1983. Appellant cross-appellee National Railroad Passenger Corporation ("Amtrak") filed a Notice of Appeal with the United States Court of Appeals for the Seventh Circuit on January 10, 1984 and filed its jurisdictional statement in No. 83-1492 ("Amtrak J.S.") on March 9, 1984. The five appellee cross-appellant railroads ("Railroads") docketed a timely cross-appeal pursuant to Supreme Court Rule 12.4 by filing a jurisdictional statement in No. 83-1633 on April 6, 1984.

In their Motion to Dismiss or Affirm in No. 83-1492, dated May 18, 1984, the Railroads argued that the decision below was based on nonconstitutional grounds, and that therefore jurisdiction of Amtrak's appeal did not lie under 28 U.S.C. §1252. Given that this Court has noted probable jurisdiction in No. 83-1492, 105 S. Ct. 76 (1984), the Railroads will assume that the constitutional issues raised below are in fact presented by the decision of the Court of Appeals, and are properly before this Court. However, as argued in Part V of this brief, they continue to urge that the decision below can and should be affirmed on nonconstitutional grounds.

This Court has postponed the question of jurisdiction in No. 83-1633. 105 S. Ct. 76 (1984). The Railroads filed this cross-appeal because, although they believe they are entitled to argue the question presented by the cross-appeal in defense of the judgment below in No. 83-1492, reversal of the decision of the Court of Appeals on the question may entitle them to a broader measure of relief than the Court of Appeals granted. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n. 4 (1970); Supreme Court Rule 10.5. The decision of the Court of Appeals, while requiring entry of judgment in favor of the Railroads, also "affirmed in part" the judgment of the District Court (Amtrak J.S. at 29a), thereby apparently upholding in part the District Court's denial of the declaratory relief requested by the Railroads.[1]

Jurisdiction in No. 83-1633 is predicated upon 28 U.S.C. §1252. This Court has previously authorized the filing of cross appeals under 28 U.S.C. §1252, see *Regan v. Taxation with Representation of Washington*, ___ U.S. ___, 103 S. Ct. 1997, 1999 n.3 (1983), and has concluded that "when we have properly asserted jurisdiction under §1252, the whole case is to come before us." *Heckler v. Edwards*, ___ U.S. ___, 104 S. Ct. 1532, 1537-38 (1984). Assuming then that the Court properly has jurisdiction in No. 83-1492, it also has jurisdiction in No. 83-1633.

[1] In their complaint, the Railroads prayed for, among other things, a judgment under 28 U.S.C. §2201 "declaring that Amtrak has no right to obtain reimbursement from [Railroads] for providing free and reduced-rate rail transportation to present and retired employees of [Railroads] and their dependents." J.A. at 8.

The substantiality of the question presented by the cross-appeal is demonstrated by the arguments set forth in Part II of this brief.

STATEMENT OF THE CASE

Prior to May 1, 1971, each of the five appellee cross-appellant Railroads provided intercity rail passenger service to the public. As an incident to this service, each Railroad had for many years allowed its employees and their families to travel free or for reduced fares on the passenger trains it operated; the Railroads did not, however, except in limited instances, provide free or reduced fare travel over lines of other railroads. These employee travel privileges (generally called "pass privileges") were offered only to the extent that space was available after accommodating other passengers, and whenever the Railroads discontinued passenger trains the pass privileges were diminished to that extent. The pass privileges granted by the Railroads were not required by any collective bargaining agreement, but the effect of eliminating those privileges was taken into consideration by the Interstate Commerce Commission in deciding applications under the Interstate Commerce Act for discontinuance of passenger trains (*see, e.g., Penn Central Co. Discontinuance of Trains Nos. 574 and 575*, 334 I.C.C. 312, 332 (1969)). Because of the "space available" nature of the pass privileges, the Railroads considered the cost of the privileges to be minimal. (Complaint and Answer, ¶4, J.A.

at 3, 15-16;[2] Affidavits of Ruegg (¶3), Farrell (p. 2), Howes (¶4), Davis (¶2) at R. 27; GAO Report, J.A. at 48, 64.)

By the late 1960s, rail passenger service had become unprofitable, and the Railroads and other railroads had instituted numerous proceedings with the Interstate Commerce Commission seeking discontinuance of passenger trains. In order to avoid the threatened cessation of all or most rail passenger service, Congress enacted the Rail Passenger Service Act of 1970 ("RPSA"). The RPSA created a new federal corporation—Amtrak—and offered to the railroads a means by which they could be contractually relieved of their responsibility for intercity rail passenger service. (H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. 2, 3 (1970).)

Section 401(a)(1) of the RPSA, 45 U.S.C. §561(a)(1), provided that upon the request of a railroad, Amtrak was "authorized" to enter into a "contract" (subsequently called the "Basic Agreement") which would "relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service." The RPSA went on to provide, in Section 401(a)(2), 45 U.S.C. §561(a)(2), that "[i]n consideration of being relieved of this responsibility," a railroad was to pay Amtrak certain sums of money. The RPSA further provided, in Section 402, 45 U.S.C. §562, that the railroads were to contract with Amtrak to provide tracks, facilities and services to Amtrak, for which they were to be paid "just and reasonable" compensation; and in Section 405(a), 45 U.S.C. §565(a), that they were to provide arrangements to protect the interests of employees affected by a discontinuance of intercity rail passenger service. Approval of the latter arrangements by the Secretary of Labor was

[2] References herein to "Complaint and Answer" include the essentially identical allegations and answers with respect to all of the Railroads, although only those with respect to Atchison, Topeka and Santa Fe Railway Co. are set out in the Joint Appendix.

required by Section 405(b), 45 U.S.C. §565(b), as a precondition to the making of a contract under Section 401(a)(1).

Although not all railroads were willing to agree to the terms set forth in Section 401 of the RPSA, the five appellee-cross appellant Railroads did so. They entered into the Basic Agreement, paid consideration to Amtrak in the collective amount of $82.8 million, adopted labor protection arrangements approved by the Secretary of Labor, and discontinued all their intercity rail passenger operations (including pass privileges) as of April 30, 1971. On May 1, 1971, Amtrak commenced its rail passenger service, operating many of the routes discontinued by the Railroads as well as other routes. (Complaint and Answer, ¶¶5, 6, J.A. at 3-4, 16-17, and Ex. B Appendix C-1 at R. 1; Affs. of Ruegg (¶4), Farrell (p. 2), Howes (¶6), Davis (¶3) at R. 27; GAO Report, J.A. at 48.)

Section 7.5 of the Basic Agreement stated that "[t]ransportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak]." When Amtrak commenced its rail passenger service, it voluntarily adopted its own program of pass privileges for railroad employees pursuant to this provision, for which it assumed the entire financial responsibility. (Complaint and Answer, ¶7, J.A. at 4-5, 17; Amtrak Brf. at 7-9.)

In 1972 Congress enacted Pub. L. No. 92-316, which added Section 405(f) to the RPSA. Section 405(f) required Amtrak to provide pass privileges over its entire system to railroad employees and their dependents who had pass privileges of any kind on April 30, 1971. It further provided that such privileges would apply only to the extent that space was available. Pursuant to this statute, Amtrak adopted a uniform policy that afforded either free or half-fare travel to such persons over the lines of their home railroad, and half-fare privileges over the lines of all other

roads.[3] (Complaint and Answer, ¶9, J.A. 5, 17; GAO Report, J.A. at 53-54.)

Section 405(f) as enacted in 1972 also required the railroads to pay for "such costs as may be incurred" by Amtrak in providing the mandatory pass privileges, and authorized the Interstate Commerce Commission to determine those costs if a railroad and Amtrak were unable to reach agreement as to the payment within ninety days. No such agreement was reached by any of the Railroads, and the matter was submitted to the Commission. The Commission found that the cost of the privileges, taking into account their "space available" nature, was $.00079 (less than one-tenth of a cent) per mile,[4] and that the half fares received by Amtrak from many statutory pass riders should be offset against this amount. *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Act*, ICC Finance Docket No. 27194, December 18, 1972, J.A. at 23-38 ("*Cost Reimbursement Decision*"). Such half fares have always exceeded the costs as determined by the Commission. (Complaint and Answer, ¶10, J.A. 5-6, 17-18; Affs. of Taylor (¶3), Deasey (¶3) at R. 27; GAO Report, J.A. at 64.)

By the late 1970's it was apparent to Congress that Amtrak had become a substantial drain upon the federal

[3] Contrary to the suggestions of Amtrak and the United States (Amtrak Brf. at 9-10; U.S. Brf. at 5-6), the record does not show that any of the five appellee cross-appellant Railroads sought the addition of §405(f) to the RPSA. The record shows only that Penn Central and Norfolk and Western complained of Amtrak's pass policies because of circumstances unique to those railroads. The Penn Central had apparently provided for passes in its collective bargaining agreement (*see Baker v. System Federation No. 1*, 331 F.Supp. 1363 (E.D. Pa. 1971)), and Norfolk and Western employees had been completely excluded from Amtrak's voluntary pass program (J.A. at 95-96).

[4] The United States erroneously refers to the cost as 0.79 cents per passenger mile. U.S. Brf. at 8. This should read 0.79 *mills* per passenger mile. See J.A. at 36.

treasury. The Senate Report on what became the Amtrak Reorganization Act of 1979 noted that in the seven years in which Amtrak had existed, the federal subsidy had increased to "the point where the Federal Government provides all of Amtrak's capital improvements funds, two-thirds of its operating funds and all of the funds required to repay $900 million in guaranteed loans." S. Rep. No. 96-183, 96th Cong., 1st Sess. 11 (1979). As a result, Congress enacted the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73 (1979), which contained a number of measures aimed at reducing Amtrak's deficits. *Id.* at 7-9; *see also* H.R. Rep. No. 96-189, 96th Cong., 1st Sess. 30-31 (1979); H. Conf. Rep. No. 96-481, 96th Cong., 1st Sess. 3 (1979).

One of the provisions of the Amtrak Reorganization Act of 1979 was an amendment to Section 405(f) of the RPSA (the "1979 Amendment"). The 1979 Amendment substituted for the provision that Amtrak should receive the "costs" of the pass privileges provided under Sec. 405(f) a requirement that for the two-year period commencing on October 1, 1979, Amtrak should be "reimbursed" for the pass privileges by payments from the railroads in an amount equal to "25 per cent of the systemwide average monthly yield per revenue passenger mile" (*i.e.*, 25 per cent of average total revenues per mile over the Amtrak system) for each mile of pass travel. This payment requirement was to apply regardless of whether Amtrak provided the travel free of charge or collected a half fare for it. The Senate Committee Report on the 1979 Act stated (with respect to an earlier version of this payment requirement) that the new requirement "reflect[ed] revenue considerations rather than cost considerations." S. Rep. No. 96-183, *supra*, at 10.

The Amtrak Reorganization Act of 1979 also contained, in Section 120(b), a direction to the Comptroller General

to study the pass privileges provided under Section 405(f) and to submit a report "setting forth recommendations regarding the appropriate means for reimbursing [Amtrak] for the cost of providing such transportation services, taking into account the value of the services being provided." The General Accounting Office ("GAO") did submit such a report to Congress (set out in J.A. at 42-84) which concluded that fully allocated costs were "probably not a realistic basis" for reimbursement; that Amtrak "has not been able to identify and adequately document incremental costs that would not be offset by the pass riders' half fares"; that "the purpose of the space availability criteria . . . is to ensure that pass riders do not increase costs"; and that it "could not find adequate analytical evidence to establish whether Amtrak should be reimbursed for the value of the service it provides pass riders or for the incremental cost of providing the service." J.A. at 63, 64, 77, 80. The GAO Report did not take into consideration the release from all responsibility for intercity rail passenger service set forth in Section 401(a) of the RPSA and the Basic Agreement, nor did it comment on the propriety of requiring the same payment for each mile of half fare pass travel as for each mile of free pass travel.

In 1981 Congress enacted Pub. L. No. 97-35 (the "1981 Amendment"), which further amended Section 405(f) to make the payment requirement of the 1979 Amendment permanent. Commencing with the month of October 1979 Amtrak has collected from the Railroads pursuant to the payment requirement amounts which have exceeded 2 cents per mile for all employee pass travel covered by Section 405(f). In the first ten months these collections from the five Railroads exceeded $1 million. (Complaint and Answer, ¶¶12, 13, J.A. at 6-7, 18; see GAO Report, J.A. at 51.) To date they exceed $5 million.

In December 1980 the Railroads filed this action against Amtrak asserting that the payment requirement of the

1979 Amendment violated the Fifth Amendment because it impaired the rights which the Railroads had acquired under Section 401(a) of the RPSA and the Basic Agreement. The complaint alleged that pass privileges constituted "intercity rail passenger service" from which the Railroads had been relieved of their "entire responsibility," and that in addition the amounts of the required payments exceeded the cost of the pass privileges and therefore required the Railroads to subsidize intercity rail passenger service to the general public. J.A. at 7. The complaint further alleged that the payment requirement violated the Fifth Amendment apart from any impairment because the amounts of the required payments bore "no reasonable relationship to the services provided" in providing the pass privileges. J.A. at 9. The Railroads prayed for a money judgment for all sums paid to Amtrak under the 1979 Amendment and also a declaratory judgment that Amtrak had no right to reimbursement from the railroads for any pass privileges. J.A. at 8. The Railroads subsequently amended their complaint to make their claims applicable to the 1981 Amendment as well. J.A. at 102.

The Railroads filed a Motion for Summary Judgment, and Amtrak filed a Cross-Motion for Summary Judgment. J.A. at 22, 39. The United States intervened as a defendant under 28 U.S.C. §2403 and filed a Motion to Dismiss, or in the alternative, for Summary Judgment. J.A. at 101. Although concluding that the Basic Agreement "may well constitute a contract between the United States and the railroads" (Amtrak J.S. at 17a), the District Court held that any such contract had not been impaired and that the payment requirement was not "arbitrary or irrational" and therefore entered an order granting the summary judgment motions of Amtrak and the United States. Amtrak J.S. at 11a-27a.

The Railroads appealed the decision of the District Court to the Court of Appeals for the Seventh Circuit, and on December 13, 1983, the Court of Appeals entered its decision affirming in part and reversing in part. The Court of Appeals agreed with the District Court that employee pass privileges were not a part of the "intercity rail passenger service" from which the Railroads had been relieved of their "entire responsibility" on the ground that such privileges were not a "responsibility" of the Railroads. Amtrak J.S. at 6a-7a. It further held, however, that the payment requirement of the 1979 and 1981 Amendments "authorizes reimbursement beyond the costs of the passes" and "thereby transfers funds from the railroads to Amtrak, which funds Amtrak may in turn use to finance aspects of its operations that were once part of the railroads' entire responsibility for the provision of intercity rail passenger service." Amtrak J.S. at 8a. The 1979 and 1981 Amendments thus attempted "to take back part of what Congress authorized Amtrak to give in the basic agreement." Amtrak J.S. at 8a. The Court of Appeals also concluded that, because the payment requirement was the same for pass riders who paid half fares as for those who rode free, it "irrationally eliminates the offset for half fares." Amtrak J.S. at 10a. The Court of Appeals found no satisfactory reason "why Amtrak should realize a windfall, an amount in excess of what the railroads would have expended had they provided the pass privileges," and therefore held that the payment requirement of the 1979 and 1981 Amendments "unreasonably and illegally impairs the rights of the railroads under the basic agreement and may not be enforced." Amtrak J.S. at 9a, 10a.

The Court of Appeals decision requires entry of a judgment in favor of the Railroads for the monetary amounts claimed, and for a declaration that the payment requirement of the 1979 and 1981 Amendments may not be enforced against them, but apparently affirms the judgment against the Railroads on their prayer for a declaration that Amtrak has no right whatever to obtain reimbursement for pass privileges. Amtrak appeals in No. 83-1492 from that part of the decision in favor of the Railroads, and the Railroads cross-appeal in No. 83-1633 from that part of the decision against them.

SUMMARY OF ARGUMENT

In the Rail Passenger Service Act, Congress, as part of a comprehensive solution to the financial crisis that was destroying the rail passenger service system, offered to relieve the railroads, from and after May 1, 1971, of their "entire responsibility for the provision of intercity rail passenger service" if they would pay certain "consideration" to Amtrak and enter into a certain "contract" with Amtrak. The Railroads paid Amtrak the required consideration in a total amount exceeding $80 million and entered into the required contract (the "Basic Agreement"), and Amtrak thereafter assumed the Railroads' responsibility for providing intercity rail passenger service. The RPSA and the Basic Agreements created an obligation on the part of the United States because the RPSA expressly "authorized" Amtrak to "contract" on its behalf, and because the promise they made to the Railroads—a release from the Railroads' entire intercity rail passenger responsibility—was one that only the United States could fulfill.

By 1979 Amtrak's deficits incurred in providing rail passenger service had assumed enormous proportions, and Congress passed the Amtrak Reorganization Act of 1979 in an attempt to reduce them. One of the deficit-reducing provisions was an amendment to Section 405(f) of the RPSA (subsequently reenacted in 1981), the effect of which is to require the Railroads to make additional

payments to Amtrak in excess of $1 million per year. Although the 1979 Amendment purports to require these payments as "reimbursement" to Amtrak for "space available" pass privileges which Amtrak is required to supply to certain railroad employees under Section 405(f), the payments in fact reduce Amtrak's deficit incurred in providing intercity rail passenger service to the public. The "costs" of the pass privileges were found by the Interstate Commerce Commission in 1972 to be less than one-tenth of one cent per mile, whereas the Railroads are required to pay more than twenty times that amount under the 1979 Amendment; moreover, Amtrak receives half-fares from many pass riders which wholly exceed its costs for all pass riders.

In light of the foregoing, the payment requirement of the 1979 and 1981 Amendments directly and seriously impairs the obligation of the United States in violation of the Fifth Amendment under the principles established by *Lynch v. United States*, 292 U.S. 571 (1934), and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The provision of free and reduced fare passenger service to railroad employees has historically been considered a necessary incident to providing public passenger service and squarely falls within the definition of "intercity rail passenger service," from which the Railroads were relieved of responsibility by the RPSA. In addition, as found by the Court of Appeals, the payment requirement forces the Railroads to pay amounts in excess of the incremental cost of the pass privileges, which amounts are directly allocable to the provision of intercity rail passenger service to the public, thereby impairing the Railroads' contractual rights even under the most restrictive interpretation of the RPSA and the Basic Agreements. Such impairment is not justified or otherwise excusable, inasmuch as Congress adopted the payment requirement purely to reduce its own subsidy of Amtrak, not due to any legitimate public policy need for such payments.

ARGUMENT

I.

THE RELEASE FROM ALL RESPONSIBILITY FOR INTERCITY RAIL PASSENGER SERVICE IS A CONTRACTUAL OBLIGATION OF THE UNITED STATES PROTECTED BY THE FIFTH AMENDMENT.

A. The Fifth Amendment Strictly Limits The Power Of The Federal Government To Impair Its Own Contracts.

This Court has long recognized that valid contracts of the United States are protected by the Fifth Amendment. As Justice Brandeis stated for a unanimous Court in *Lynch v. United States*, 292 U.S. 571, 579 (1934):

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

Amtrak and the United States do not deny that contract rights with the United States are constitutionally protected.[5] They appear to assert, however, that this Court should assess *any* federal impairment of contract by the same standards used to measure the constitutionality of retroactive social and economic legislation generally. Relying upon last Term's decision in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, ____ U.S. ____, 104 S. Ct. 2709 (1984), they claim the Federal Government may abrogate contractual rights whenever there is a "ra-

[5] The principle that contractual obligations are "property" for Fifth and Fourteenth Amendment purposes has been widely followed. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 16 (1977); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 n. 12 (1978).

tional basis" for doing so. But the Court's language in *Pension Benefit*, which involved only private contractual rights, not the obligation of a government, was carefully qualified and did not suggest any such sweeping principle. *Id.* at 2719-2720. In particular, *Pension Benefit* does not cite, much less question, the decisions which establish that a much stricter standard of review is appropriate when the United States has impaired *its own* contractual obligations.

The existence of a stricter standard for assessing federal impairment of federal government obligations is conclusively demonstrated by the *Gold Clause Cases*, two decisions of this Court which involved a Congressional resolution of 1933 providing that all financial obligations payable in gold or equivalent value could be discharged by payment in paper money. As applied to private obligations containing covenants for payment in gold, the Court sustained the resolution on the basis of Congress' power to coin and regulate the value of money. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935). But as applied to the United States' *own* obligations, the Court held in *Perry v. United States*, 294 U.S. 330, 350-51 (1935), that the resolution was unconstitutional:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.

In this one respect at least, the operation of the Fifth Amendment upon the federal government is quite similar

to that of the Contract Clause on state governments. This Court has held that impairments of a state government's own contracts "face more stringent examination" than do laws "regulating contractual relations between private parties." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978). See also *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-413 n. 14 (1983).

There are at least two reasons why government impairment of its own obligations is treated differently than impairment of private obligations. First, as stated in *Lynch v. United States*, *supra*, 292 U.S. at 580, "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." Absent a rule of constitutional magnitude limiting the power of governmental units to abrogate their own contracts, many persons would simply refuse to loan money, sell supplies, relocate, or otherwise act in reliance upon the word of the government. At the very least, the *cost* to the government of inducing this sort of reliance by others would rise appreciably, because of the greater risk.

Second, as the Court observed in *United States Trust Co.*, *supra*, 431 U.S. at 26, public contracts stand on a different footing from private contracts because "the State's self-interest is at stake." When the government seeks to impair a private contractual obligation, it is not inappropriate to assume that the legislature functions as a neutral arbiter between two competing interests that have roughly equal access to the political process. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 n. 4 (1938). But when the government asserts the need to impair one of its own contractual obligations, the legislature cannot be presumed to function in a disinterested manner. See Comment, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L. J. 1623, 1647-49 (1980). To avoid these difficulties, this Court has recog-

nized the bedrock constitutional principle, at both the state and federal level, that absent compelling circumstances "government must keep its word." L. Tribe, American Constitutional Law 470 (1978).[6]

B. The Release From All Responsibility For Intercity Rail Passenger Service Is A Contractual Obligation Of The United States Of A Financial Nature.

The threshold inquiry in this case, therefore, is whether the Railroad's release from all responsibility for intercity rail passenger service is a contractual obligation of the United States. *See Keefe v. Clark*, 322 U.S. 393, 396 (1944). The United States asserts various technical arguments in an effort to show that the release is not its contractual obligation, but the realities underlying the enactment of the RPSA clearly establich that it is.

The contractual release from all responsibility for intercity rail passenger service was central to the entire concept of the RPSA. Under the Act, no railroad was com-

[6] In recognizing the principle that the United States may not generally abrogate its own contracts, this Court has sometimes relied upon the Takings Clause of the Fifth Amendment, *Lynch v. United States*, 292 U.S. 571, 579-81 (1934), and sometimes upon the Due Process Clause, *Lynch*, *supra* at 579; *Sinking-Fund Cases*, 99 U.S. 700, 718-19 (1878). Thus, the narrow claims presented by the Railroads in this case can be derived from either or both clauses of the Fifth Amendment. The Railroads have never "abandoned" their reliance on the Takings Clause, as suggested by Amtrak and the United States (Amtrak Brf. at 38; U.S. Brf. at 19.) This is not, however, a "taking" case like the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), involving unique property rights of uncertain value, which must be brought against the United States in the Claims Court pursuant to the Tucker Act, 28 U.S.C. Sec. 1491; it is inconceivable that Congress intended for the Railroads to pay money to Amtrak and then sue the United States to get it back. The payment requirement here is thus like the mortgage moratorium provisions of the Frazier-Lemke Act which were simply held unenforceable under the Takings Clause in *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935).

pelled to relinquish passenger service obligations (and, in fact, some did not). A railroad's decision to do so was strictly voluntary, and was to be manifested by its election to enter into a contract (the Basic Agreement) with a newly-chartered federal corporation (Amtrak).

The Act and the Basic Agreements are replete with references that make it plain the release was intended to be a contract. The Act, in §401(a)(1), states expressly that participating carriers were to receive "a *contract* to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service" (emphasis supplied). In order to receive such a "contract," a carrier had to agree to pay "consideration" equal to 50% of its 1969 fully distributed passenger service deficit. RPSA, §401(a)(2). The Railroads here paid such "consideration," amounting in the aggregate to over $80 million. In return, they were allowed to enter into a written contract which stated, as its first substantive provision, that the Railroad "shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service." Basic Agreement, Section 2.1, J.A. 13.[7] Where language of contract is used repeatedly in a statute creating a governmental obligation, and the parties perform acts consistent with a contractual intent, it must be presumed that "the word 'contract' was not

[7] The United States explains the appearance of the release in the Basic Agreements on the ground that it was a "condition of performance" by the Railroads. U.S. Brf. at 28. The "shall be relieved" language is wholly inconsistent with this contention. The second paragraph of Section 2.1 of the Basic Agreement, pledging Amtrak's cooperation in resisting efforts of any "Federal, State or local court or agency of government" to require a Railroad to resume passenger service after April 30, 1971, does not support the United States' argument; it simply requires Amtrak to assist the Railroads in the event of governmental action inconsistent with the release.

used inadvertently or in other than its usual legal meaning." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 105 (1938).

Furthermore, although the Act specified that Amtrak was to be the signatory of the contract, the contract plainly was intended to give rise to an obligation of the United States. Amtrak's authority to bind the United States to this obligation is expressly set forth in the statute. Although Amtrak is not an official "agency" of the United States (RPSA, §301, 45 U.S.C. §541), Section 401(a)(1) of the RPSA expressly states that Amtrak "*is authorized* to contract . . . to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service" (emphasis supplied). Moreover, the Act expressly states that the release includes, among other things, relief from responsibilities "under part I of the Interstate Commerce Act or any State or other law relating to the provision of intercity passenger service." RPSA, §401(a)(1). Amtrak concededly has no authority to preempt federal, state, and local statutory obligations. Only the United States, acting in its capacity as national sovereign, could grant such relief. If the United States were not bound by this promise, then the Basic Agreements would be illusory because Amtrak, the signatory, could not provide the consideration which is the linchpin of the entire RPSA concept.

The contractual obligation of the United States in this case is closely analogous to the statutory covenant with bondholders at issue in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), which this Court held to be a contractual obligation of a State subject to the Contract Clause. Here, as in *United States Trust Co.*, the government has not itself executed a written agreement setting forth its obligation, but rather has made certain affirmative promises in the course of legislation authorizing

some other entity—in this case Amtrak—to enter into express written agreements. Similarly, here as in *United States Trust Co.*, the government has by its statutory language evidenced a clear intent to be bound by a promise. And finally, here as there the government has received the benefit of its bargain: the overwhelming majority of the Nation's railroads were induced to provide initial capitalization in order to make Amtrak a reality.[8]

The United States asserts that the RPSA and the Basic Agreements do not represent a contractual obligation of the United States, but rather the "gratuitous provision of regulatory relief." U.S. Brf. at 26. In support of this argument the United States first invokes the notion that there are certain "reserved powers"—such as the power to regulate interstate commerce—which Congress cannot bargain away, although it can admittedly bind itself to a "commercial obligation, such as the payment of money or conveyance of property." *Id.* at 19-20. See *United States Trust Co. v. New Jersey*, *supra*, 431 U.S. at 21-25. According to the United States, the release from responsibility for intercity rail passenger service is a promise by Congress not to exercise its power to regulate interstate commerce, and hence is no promise at all.

Assuming *arguendo* the continued validity of the "reserved powers" doctrine, with its wooden distinction between the types of powers as to which the legislature may and may not bind itself, see *United States Trust Co.*, *supra*, 431 U.S. at 24 ("[s]uch formalistic distinctions perhaps cannot be dispositive"), the release cannot be

[8] Alternatively, §401(a) can be viewed as a unilateral offer to contract by the United States which was accepted by the railroads when they entered into the Basic Agreements. *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Marvel v. Dunnemann*, 490 F.Supp. 170 (D. Del. 1980).

characterized as a pledge not to regulate interstate commerce. There is nothing in the release which prohibits the United States from regulating the intercity rail passenger service provided by Amtrak in order to protect the health, morals or safety of the general public which rides on such trains, or the employees who operate such trains. Nor is there anything in the release which bars the Federal Government, acting pursuant to the Commerce Clause, from ordering Amtrak to provide pass privileges to railroad employees.

On the contrary, the release from all responsibility for intercity rail passenger service was a release from continuing *financial* obligations associated with passenger trains, not a release from the obligations attendant upon *operating* passenger trains. As stated in the Senate Report on the original version of the RPSA:

> Therefore, it is necessary for the Congress to enact a program to insure continued operation of essential passenger services; to provide for their near-term upgrading and modernization; and to relieve the railroad industry to a meaningful extent of the *onerous financial burden* of passenger operations. S. Rep. No. 91-765, 91st Cong., 2d Sess. 6 (1970) (emphasis supplied).

The RPSA did not in any way eliminate the Railroads' operating responsibilities; the Railroads continue to provide facilities and services to Amtrak for the transportation of passengers. What it did eliminate was the financial risks associated with operating responsibilities, substituting for enterprise liability the provision that a contracting railroad would receive "just and reasonable" compensation for its services. RPSA, §402. It would make nonsense of the Act and the concept of the release to construe it to mean that the Railroads no longer had to operate passenger trains, but that they could be required to absorb all of the deficits incurred by Amtrak in doing so. Such a release would make the Railroads worse off than

they were before--they would still be liable for all the deficits incurred in intercity rail passenger operations, but they would be at the complete mercy of Amtrak as to how large those deficits would be. The Railroads would never have entered into the Basic Agreement if this were what it meant. Affidavits of Ruegg (¶6), Farrell (p. 2), Howes (¶9) at R. 27. Thus, the contractual release was not a qualification of Congress' power to regulate interstate commerce, but more akin to a government financial obligation or tax exemption contract—both of which are clearly binding on the government. *United States Trust Co., supra*, 431 U.S. at 24 n. 21.[9]

The United States further argues that Section 301 of the RPSA, in which Congress included the standard reservation of the right to "repeal, alter, or amend this Act," negates the promises made by the United States to the Railroads in this case. U.S. Brf. at 22-23. It would be inconsistent with the entire history of the RPSA, not to mention blatantly unfair to the Railroads which paid millions of dollars to enter into the Basic Agreement, to construe Section 301 to give the United States absolute power to cancel its side of the bargain. Fortunately, there is a far more reasonable construction. Section 301 plainly contemplates only repeal, alteration or amendment of "this Act," not obligations incurred under the authority

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[9] Like a tax exemption contract, the release here is a pledge by the government to relieve the Railroads from a type of burdensome "social taxation"—the stream of deficits produced by the responsibility to operate intercity passenger trains. Like a government debt obligation, the release promised a "return," in the form of relief from such stream of deficits, on the Railroads' payment of millions of dollars to capitalize Amtrak. From the latter perspective, the subsequent legislation requiring the Railroads to reimburse Amtrak for free and reduced rate transportation is analogous to legislation reducing the interest payable on a government debt obligation—a clear impairment of contract. See *Murray v. Charleston*, 96 U.S. 432 (1878).

granted in the Act while it is in effect. Section 301 is the section of the Act which authorizes the incorporation of Amtrak as a federally-chartered "for profit corporation," and sets forth its corporate purpose.[10] The reservation of the right to "repeal, alter, or amend" in such a provision means that the "corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; *but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired.*" *Coombes v. Getz*, 285 U.S. 434, 441-42 (1932) (emphasis supplied). *Accord*, *Sinking-Fund Cases*, *supra*, 99 U.S. at 721. Here, the United States is the chartering government and Amtrak the chartered corporation. Thus, the release from all intercity rail passenger responsibility, which was vested in the Railroads as of 1971, is a contractual right of "third persons" that cannot be impaired or destroyed by a subsequent legislative enactment.

Finally, the United States contends that the release was no different from a wholesale discontinuance proceeding, and that a discontinuance certificate does not guarantee against reimposition of passenger service obligations so long as the carrier continues to operate freight lines in interstate commerce. See U.S. Brf. at 15, 23-26, citing *Chesapeake & Ohio Ry. v. Public Service Comm'n*, 242

[10] It has long been established that a corporate charter is a contract between the chartering government and the corporation, and that absent a reservation of the right to "repeal, alter, or amend," a subsequent modification of the charter can constitute an impairment of contract. *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); *Sinking-Fund Cases*, 99 U.S. 700 (1878) (federally-chartered corporation). Accordingly, it has long been universal practice to include a provision in statutes authorizing the chartering of new corporations to the effect that the chartering government reserves the right to "repeal, alter, or amend." See generally B. Wright, The Contract Clause of the Constitution 168-178 (1938).

U.S. 603 (1917). This overlooks the fact that the release promises relief far broader than that of a discontinuance certificate and was offered in exchange for the payment of millions of dollars of "consideration."

In summary, the RPSA and the Basic Agreements clearly imposed a binding contractual obligation on the United States, and there is no reason not to give effect to that obligation.

II.

THE PAYMENT REQUIREMENT OF SECTION 405(f) IMPAIRS THE RELEASE FROM ALL RESPONSIBILITY FOR INTERCITY RAIL PASSENGER SERVICE BECAUSE THE RELEASE INCLUDES FINANCIAL RESPONSIBILITY FOR EMPLOYEE PASS PRIVILEGES.

Given that the release from all responsibility for intercity rail passenger service is a contractual obligation of the United States, the next question is whether the reimbursement requirement of the 1979 and 1981 Amendments substantially impairs that obligation. See *United States Trust Co.*, *supra*, 431 U.S. at 17. The reimbursement requirement impairs the release both directly and indirectly. The direct impairment, which is discussed in this section of the brief, derives from the fact that responsibility for intercity rail passenger service includes financial responsibility for pass riders. The indirect impairment, which is discussed in Part III, derives from the fact that the reimbursement requirement compels the Railroads to subsidize Amtrak's general passenger operations.

The release is set forth in Section 401(a)(1) of the RPSA and in Paragraph 2.1 of the Basic Agreements (J.A. at 13), both of which provide that the Railroads "shall be relieved" of their "entire responsibility for the provision of intercity rail passenger service." "Intercity rail passenger service" is expressly defined in section 102(5) of the RPSA (45 U.S.C. §502(5)):

> "Intercity rail passenger service" means *all* rail passenger service other than commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations . . . (Emphasis supplied.)

Article I of the Basic Agreements contains a similar definition. J.A. at 12. In other words, under the Act and the Basic Agreements "intercity rail passenger service" includes *all* transportation of persons by rail not otherwise excluded by the definition. There is no exclusion for transportation services provided to railroad employees pursuant to pass privileges. Hence by the plain terms of both the RPSA and the Basic Agreements, ridership pursuant to pass privileges is necessarily included within the terms of the release.

The Act does not define what it means by "responsibility" for intercity rail passenger service. However, when the Act and the Basic Agreements relieved the Railroads of their "entire responsibility," the only possible interpretation is that they were relieved of *financial* responsibility. See pages 20-21, *supra*. Given that "intercity rail passenger service" is expressly defined to include pass riders, and that "all responsibility" must be interpreted to mean financial responsibility, it necessarily follows that the Railroads were relieved of financial responsibility for employee pass privileges.

There was good reason for Congress to define "intercity rail passenger service" in a way that caused the Railroads' release to apply to responsibility for providing passenger service to railroad employees. As Amtrak has pointed out (Amtrak Brf. at 7, 11; see also GAO Report, J.A. at 47-48), pass privileges for employees of railroads offering passenger service had been an accepted industry practice for decades prior to 1970. Because of this, it was widely recognized that such passes were a necessary

incident—and a necessary cost, albeit small—of providing rail passenger service, no different from the many other indirect costs associated with transporting rail passengers, such as advertising, reservation systems, station facilities and the like, which had also become accepted industry practices. In enacting legislation whereby Amtrak would contract to take over the Railroads' "responsibility" for intercity rail passenger service, it was entirely reasonable for Congress to provide, and certainly reasonable for the Railroads to expect, that in doing so Amtrak would assume the obligations of all of these incidental costs, and that the Railroads would be relieved of them. Congress was not writing on a clean slate; it was transferring financial responsibility for an entire passenger transportation system that had been in existence for more than a century, and there is nothing in the RPSA or its legislative history to suggest that the transfer of responsibility applied only to selected aspects of that system.

Section 7.5 of the Basic Agreement, devoted to transportation privileges, supports the conclusion that the release applies to pass privileges. That section provides that "[t]ransportation privileges, if any, with respect to . . . personal travel of Railroad personnel *shall be as determined by NRPC*" (emphasis supplied). Under general rules of contract interpretation,[11] this allocation to Amtrak of responsibility for providing pass privileges creates the inference that Amtrak was also to bear the financial responsibility for such passes. Restatement (2nd) of Contracts §§202-03 (1979). Furthermore, Amtrak in fact paid the costs of the pass program prior to the enactment of

[11] The general rules of interpretation are clearly applicable here. As stated in *Lynch v. United States*, 292 U.S. 571, 579 (1934): "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

the first version of Section 405(f) in 1972. Thus the practical construction of the parties assumed the Railroads were relieved from responsibility for pass privileges. This is also strong evidence of the meaning of the contract. *See, e.g.*, Restatement (2nd) of Contracts §§201(1), 202(5) (1979); Williston on Contracts §623 (3d ed. 1961).

Despite this abundant authority establishing that the release afforded the Railroads included financial responsibility for pass privileges, the Court of Appeals held that, because the Railroads were not required to provide pass privileges by "any contract or collective bargaining agreement" *in effect in 1971* (Amtrak J.S. at 6a), the obligation to fund pass privileges was not a "responsibility" from which the Railroads had been released. In so holding the Court of Appeals took far too narrow a view of the broadly worded term "entire responsibility" as used in the RPSA and the Basic Agreement. As previously stated, the purpose of the RPSA to shift the burden of the entire rail passenger system from the Railroads to Amtrak compels the conclusion that the "entire responsibility" from which the Railroads were released encompassed all the incidental costs traditionally associated with transporting rail passengers, including pass privileges. The Senators who supported the enactment of Section 405(f) in 1972,[12] and the Interstate Commerce Commission,[13] ap-

[12] As noted by Amtrak, at least one Senator believed the passes to be the subject of "promises of long standing" by the railroads. Amtrak Brf. at 11, citing 118 Cong. Rec. 14791 (1972).

[13] In numerous intercity rail passenger service discontinuance proceedings prior to 1971, the Interstate Commerce Commission—the agency long responsible for application of the Interstate Commerce Act—had held that pass ridership had to be taken into account in assessing the benefits of individual rail passenger movements. *See, e.g., Penn Central Co. Discontinuance of Trains Nos. 574 and 575*, 334 I.C.C. 312, 332 (1969); *see also Union Pacific R. Co. Discontinuance of Trains Nos. 35 and 36*, 338 I.C.C. 50, 53 n. 1 (1970); *Penn Central Transp. Co. Discontinuance of 34*

(Footnote continued on following page)

parently considered pass privileges to be a "responsibility" of the Railroads.

But even if the Court of Appeals' narrow view were correct and pass privileges were not a "responsibility" as of 1971, it does not follow that if pass privileges *subsequently* were to become a responsibility, they would not be covered by the release. Section 401(a)(1) relieves the Railroads of their responsibilities "under part I of the Interstate Commerce Act or any State *or other law* relating to the provision of intercity passenger service" (emphasis supplied). Section 405(f) of the RPSA is clearly an "other law" relating to the provision of intercity passenger service, as that term is defined in the RPSA. More importantly, a limitation of the release to obligations in effect in 1971 would render the protection afforded the Railroads meaningless. Consistent with this interpretation, a Railroad could be required to shoulder responsibility for any type of passenger service or benefit *not mandated* by statute or contract in 1971, such as new passenger service routes, routes abandoned prior to 1971, or routes served by another carrier as of 1971. Surely this was not what Congress intended or what the Railroads reasonably understood the release to mean.

The United States contends, as an alternate ground in support of the Court of Appeals holding, that the Railroads' release was limited to "common carrier" responsibilities and that pass privileges do not fall into this category. U.S. Brf. at 29-30. This argument also overlooks the fact that pass privileges were one of a number of incidental costs traditionally associated with the railroads' com-

[13] *continued*
Trains, 338 I.C.C. 380, 474 (1970). The direct consequence of this was that the provision of pass privileges made it more difficult for carriers to discontinue passenger trains. Thus, the provision of pass privileges contributed directly to establishing the carriers' overall responsibility for passenger service.

mon carrier responsibilities and that the benefits of such privileges were taken into consideration in Interstate Commerce Commission proceedings seeking discontinuance of common carrier passenger services. In any event, the United States focuses on only that part of §401(a)(1) declaring the effect of the Railroads' release on common carrier statutes and ignores the broad language elsewhere in §401(a)(1), in the Basic Agreement, and in the legislative history of the RPSA (H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. 9 (1970)) relieving the Railroads from their "entire responsibility for the provision of intercity rail passenger service" without any "common carrier" qualification.

In short, under the terms of the Rail Passenger Service Act and Basic Agreements, when the Railroads were relieved of their "entire" responsibility for the provision of intercity rail passenger service in 1971, they were relieved of all obligations incident to the provision of such service, both present and future. The Railroads were thus relieved of the statutory obligation—first imposed by Section 405(f) in 1972 and then amended in 1979—to reimburse Amtrak for pass privileges.

III.

THE PAYMENT REQUIREMENT OF SECTION 405(f) IMPAIRS THE RELEASE FROM ALL RESPONSIBILITY FOR INTERCITY RAIL PASSENGER SERVICE BY COMPELLING THE RAILROADS TO SUBSIDIZE AMTRAK'S PASSENGER SERVICES TO THE GENERAL PUBLIC, AND IS IN ANY EVENT IRRATIONAL.

The Court of Appeals found the payment requirement of the 1979 and 1981 Amendments to Sec. 405(f) to be unenforceable because it "transfers funds from the railroads to Amtrak, which funds Amtrak may in turn use to finance aspects of its operations that were once part of the railroads' entire responsibility for the provision of

intercity rail passenger service." Amtrak J.S. at 8a. This conclusion is sound and should be affirmed.

A. The Effect And Purpose Of The 1979 And 1981 Amendments Were To Require The Railroads To Pay Part Of The Costs Of Providing Rail Passenger Service To The Public.

Neither Amtrak nor the United States has ever asserted in their briefs here or in the courts below that the additional or "incremental" costs of transporting pass riders justify the payment requirement, or that Congress ever thought they did. This is because the additional costs of "space available" travel, however they may arguably be calculated, do not approach the level of the payment requirement, and are in any event offset by the revenues obtained from half-fare pass riders. See GAO Report, J.A. at 64.[14] It thus follows, and is equally undisputed, that

[14] Although Amtrak suggests that pass privileges "to some degree" deprive it of revenues it might otherwise obtain from pass riders (Amtrak Brf. at 27), neither it nor Congress has ever quantified these supposed lost revenues or seriously contended that they approach the amounts collected from the Railroads under the payment requirement. (For such supposed lost revenues to equal the payments which the Railroads are required to make under the 1979 and 1981 Amendments, approximately 25 percent of the present free pass riders and 75 percent of the present half-fare pass riders would have to choose Amtrak at full fares over competing modes of intercity transportation, whereas less than one-half of 1 percent of the general public does so. S. Rep. No. 96-183, 96th Cong., 1st Sess. 4 (1979) (table).)

Amtrak also notes that the payment requirement is in lieu of "any charges for liability" incident to pass rider travel, as well as "other costs" of pass privileges. Amtrak Brf. at 13, n. 39. But Amtrak does not attempt to show that the amount of such "charges" justifies the required payments. Neither the record here nor the legislative history of the 1979 Amendment contain any discussion of what, if anything, the amount of such charges might be, but the Interstate Commerce Commission obviously did not consider them to be a significant factor in its determination of the "costs" of pass privileges under the 1972 version of §405(f). *Cost Reimbursement Decision*, J.A. at 23-38.

the payments required by the 1979 and 1981 Amendments may be used by Amtrak in their entirety to cover costs which are necessary to provide passenger service to the general public.

There is, moreover, very substantial evidence that the *purpose* of the payment requirement of the 1979 and 1981 Amendments was to obtain additional revenues to pay for Amtrak's passenger service to the public.[15] The Amtrak Reorganization Act of 1979, of which the 1979 Amendment to Sec. 405(f) was a part, was prompted largely by concerns over the deficits being incurred by Amtrak. S. Rep. No. 96-183, 96th Cong., 1st Sess. 11 (1979). Congress certainly knew that the amounts of the required payments added in 1979 exceeded the "costs" of the pass rider program as determined by the Interstate Commerce Commission under the 1972 version of Sec. 405(f). The Senate Committee Report on the 1979 Act stated:

> While the Committee is concerned that Amtrak may not be receiving adequate compensation from the industry for the total cost of the pass rider program, the Committee believes that the new formula reflects revenue considerations rather than cost considerations. S. Rep. No. 96-183, 96th Cong., 1st Sess. 10 (1979).

Furthermore, the internally inconsistent direction from Congress to the GAO in the 1979 Act to determine reimbursement for the "cost" of pass rider services by "taking into account the *value* of the services being provided" (Pub. L. No. 96-73 (1979), Section 120(b); emphasis supplied) and the determination to charge the railroads exactly the same amount per mile for half-fare pass travel as

[15] Although the Court of Appeals did not consider it necessary to determine the motivation for the payment requirement, it found that "it would be reasonable to conclude from the record that the financial debacle of Amtrak's first eight years contributed to the new method of cost spreading." Amtrak J.S. at 7a-8a.

for free pass travel also demonstrate a dominant motivation to increase Amtrak's revenues, rather than to assign the railroads a fair share of responsibility for passes.

B. The Railroads' Contract With The United States Releases Them From Any Obligation To Pay Amtrak Any Part Of The Costs Of Providing Rail Passenger Service To The Public.

Section 401 of the RPSA was clearly intended to relieve the Railroads from their responsibility for *public* rail passenger service. Public passenger service was unquestionably a "responsibility" of the Railroads on April 30, 1971, and it was also unquestionably a "common carrier" responsibility. It is also clear that the "responsibility" from which the Railroads were relieved was *financial* responsibility. See pages 20-21, *supra*. The whole point of the RPSA was to shift the costs of rail passenger service from the railroads to Amtrak.

In determining the scope of the financial responsibility for public passenger service from which the Railroads were released it is obviously essential to examine the financial responsibility the Railroads themselves had for such service before the RPSA was enacted. The Railroads always considered pass privileges to be incidental to public passenger service and entirely dependent upon the provision of that service; pass privileges were granted only on a "space available" basis and were discontinued when public passenger service was discontinued. Thus, when the Railroads provided passenger service, they did not allocate any more than an "insignificant" amount of incremental costs to the pass programs (GAO Report, J.A. at 48); the rest of their passenger costs they attributed to service to the public. The Interstate Commerce Commission also took this view of passenger service costs in 1972 when it concluded that the "costs" of pass privileges under the 1972 version of Section 405(f) were incremental costs. *Cost*

Reimbursement Decision, J.A. at 46. Indeed, the custom of pass privileges would undoubtedly never have arisen if passes had been thought to involve expenditures any greater than merely those of filling an otherwise empty seat.

Construing the Railroads' release in light of the facts and circumstances in existence when the contract was made (see Restatement (2d) of Contracts, §202(1) (1979)), the provisions of the RPSA and the Basic Agreement releasing the Railroads from their "entire responsibility for the provision of intercity rail passenger service" must be read to mean at the very least that the Railroads cannot be compelled by statute to pay any of the costs which are necessary to provide intercity rail passenger service to the general public and which would be incurred in the absence of any pass privileges. The payment requirement at issue here, by forcing the Railroads to pay more than the incremental costs of "space available" pass rider service, plainly violates the release as so construed. The payments directly and foreseeably reduce Amtrak's public passenger service deficits both under the principles followed by the Railroads when they had the "responsibility" for passenger service and under any common sense analysis. Thus, as stated by the Court of Appeals, the 1979 and 1981 Amendments "attempt to take back part of what Congress authorized Amtrak to give in the basic agreement" (Amtrak J.S. at 8a).

Amtrak inexplicably treats this basic issue in the most perfunctory fashion in its brief. After noting the holding of the Court of Appeals that the Basic Agreement did not release the Railroads from all pass rider obligations, Amtrak flatly asserts—in direct contradiction to what the Court of Appeals said—that therefore the Basic Agreement is irrelevant and that "the Court of Appeals' analysis must rest on the proposition that no person may be required to pay more than incremental costs for services

provided at the direction of the government" (Amtrak Brf. at 20-21).

Amtrak ignores the key element in the Court of Appeals' reasoning. The Railroads here do *not* have "the same rights and obligations as other members of the public" (Amtrak Brf. at 20), or even the same rights as other railroads which did not enter into the Basic Agreement. Even if Congress has not totally released its power to impose charges on the Railroads for pass rider services, it has plainly circumscribed that power and simply does not have the discretion to impose such charges on the Railroads that Amtrak argues it has with respect to other persons.

C. The Payment Requirement Is Irrational And Therefore Unenforceable Even Apart From The Railroads' Contract With The United States.

The major thrust of Amtrak's argument to this Court is that if the Basic Agreement is ignored, the terms of the payment requirement are within the discretion of Congress under prior decisions of this Court. Amtrak Brf. at 21-30. Even on this point Amtrak is wrong.

The GAO Report, upon which Amtrak principally relies, cannot be used to justify the amount of the payment requirement even if its failure to take into account the Railroads' release is not a fatal flaw. That report rejected fully allocated costs as a basis for the Railroads' payments under Section 405(f) and said Congress should choose between "incremental costs" and "value." J.A. at 63, 80-81. Amtrak and the United States assert that Congress properly chose the "value" approach. Amtrak Brf. at 29-30; U.S. Brf. at 34. Yet the only case cited in support of that approach, *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), dealt with fees paid to the government by users of the government's services. The

present case, however, involves compulsory payments from one person to another for services provided to a third person at the latter's discretion, a situation in which the "value" of the services is not a reasonable measure of the amount of the payments. The "value" approach is, moreover, inconsistent with this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980), that a state's exaction from litigants of sums "not reasonably related to the *costs* of using the courts" was an invalid taking (emphasis supplied).

But even if it were proper to base the payments on the "value" of the pass privileges as suggested by the GAO, the Court of Appeals was clearly correct in concluding, as an alternative ground for its decision, that the formula adopted by Congress "irrationally eliminates the offset for half fares." Amtrak J.S. at 10a. Amtrak and the United States have never attempted to explain how pass riders who already pay half fares receive more "value" than those riding for free, so as to justify identical payments from the Railroads.[16]

IV.

THE IMPAIRMENT OF THE RAILROADS' CONTRACT IS NOT EXCUSED BY CONSIDERATIONS OF PUBLIC POLICY, LACK OF RELIANCE, OR INSUBSTANTIALITY.

Amtrak and the United States assert that if the 1979 and 1981 Amendments impaired the contract rights of the Railroads, the impairment was excused for various reasons and thus did not violate the Fifth Amendment. Amtrak

[16] The payment requirement is also unreasonably set at a percentage of "average monthly yield per passenger mile," which includes revenues for services, such as metroliners, not included in the pass privileges. *See* GAO Report, J.A. at 51-52.

Brf. at 30-44; U.S. Brf. at 35-38.[17] Although this Court has recognized that state or federal legislation impairing contracts may be justified in some circumstances, none of those circumstances are present here, whether the contract right impaired was a release from all responsibility for pass riders or merely from responsibility for Amtrak's public passenger service.

A. The Impairment Was Not Reasonable And Necessary To Further An Important Public Purpose.

This Court has held that the government is not free "to consider impairing the obligations of its own contracts on a par with other policy alternatives." *United States Trust Co., supra*, 431 U.S. at 30-31. As Justice Brandeis put it in *Lynch v. United States, supra*, 292 U.S. at 580, Congress is "without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure," is not a legitimate governing act but an act of "repudiation."

In particular, where the government enters into a contractual obligation, any subsequent impairment of that contract is unconstitutional unless it is "reasonable and necessary" to serve an "important" public purpose. *United States Trust Co., supra*, 431 U.S. at 29. The government bears no small burden in justifying such an impairment, because "the State's self-interest is at stake." *Id.* at 26; see also *Energy Reserves Group, Inc., supra*, 459 U.S. 400, 412-413 n. 14.

In light of these authorities, the impairment of the Railroads' contracts by the payment requirement of the 1979

[17] The United States' argument on this point is premised upon the "rational basis" test, which is clearly inapplicable to impairments by the United States of its own contracts for reasons stated at pages 13-14, *supra*.

and 1981 Amendments cannot be justified on any public policy ground. In *United States Trust Co.*, where the legislation in question was intended to advance "[m]ass transportation, energy conservation, and environmental protection," which were goals of "important and . . . legitimate public concern" (431 U.S. at 28), the Court nevertheless struck down the offending statute because it was not necessary to impair the contract in order to achieve these ends. *Id.* at 30. Here, the immediate purpose of Section 405(f)—to preserve an employee fringe benefit—does not rise to the dignity of the public policy concerns in *United States Trust Co.* And even if the legislative purpose underlying Section 405(f) is described in more general and speculative terms, such as the desirability of maintaining labor harmony, there was no need to repudiate the Railroads' release in order to obtain that harmony; the United States or Amtrak could simply have paid for the pass privileges themselves.

Similarly, there is no merit to the suggestion that it was reasonable to make the Railroads pay for the pass privileges because they originated the practice. United States Brf. at 37. On this logic, the United States could, because the Railroads also originated the entire rail passenger system, force the Railroads to resume operating rail passenger trains, or to pay all of Amtrak's expenses, thus defeating the entire purpose of the RPSA.

In short, there was no need for the 1979 and 1981 Amendments, other than Congress' understandable desire "to reduce expenditures." Undoubtedly for this reason, Amtrak does not strongly urge a public policy justification for the impairment, but attempts instead to excuse the impairment on other grounds. Amtrak Brf. at 30-44. These grounds are, however, equally unpersuasive, for the reasons set forth below.

B. The Impairment Was Not In Accordance With The Reasonable Expectations Of The Railroads.

Amtrak argues that the impairment of the Railroads' contract rights was justified because the Railroads had no "reasonable expectations" that the impairment would not occur. Amtrak Brf. at 33-39.

Amtrak first contends that the railroad industry has historically been widely regulated; that therefore the Railroads should have expected that Congress might act to deprive them of the benefit of their bargain; and that such expectation excuses the impairment. There is, however, no basis for the proposition that the United States may regulate away its own contractual commitments. The cases cited by Amtrak (Amtrak Brf. at 33) deal with expectations regarding rights acquired under private contracts, not contracts with the United States.

Amtrak further asserts that because the Railroads would have entered into the Basic Agreement in the absence of any release from payment requirements of the type imposed by the 1979 and 1981 Amendments, they therefore could not have reasonably expected to be relieved from those payments. Amtrak Brf. at 35-36. Amtrak's assumption that the Railroads would have accepted a lesser release is highly speculative and ignores the fact that a number of major railroads did not even enter into the Basic Agreement as offered. GAO Report, J.A. at 48 n. 1. In any event, contracts are enforced according to their terms, not according to what the parties might have agreed to, and the United States in particular is bound to its contractual obligations even if it could possibly have made a better deal. *Cf. Lynch v. United States*, 292 U.S. 571, 576 (1934). Furthermore, the impairment here is of the principal obligation of the contract, not a minor collateral term as in *City of El Paso v. Simmons*, 379 U.S. 497 (1965). Thus the Railroads had every reason to ex-

pect their release to be enforced in its entirety, even if in hindsight the United States might have driven a harder bargain or obtained the same funds from the Railroads in exchange for a narrower release.

Amtrak next argues that the Railroads could not have reasonably expected to be released from payment requirements such as those imposed by the 1979 and 1981 Amendments because the RPSA imposed other obligations on them to protect employees and to cooperate in providing facilities and services to Amtrak. Amtrak Brf. at 36. The employee protection required by Section 405 of the RPSA did not include the continuation of pass privileges (*Baker v. System Federation No. 1*, 331 F.Supp. 1363, 1365 (E.D. Pa. 1971)) or any payments to Amtrak, and the arrangements established by the Railroads under that section, which were approved by the Secretary of Labor, did not provide them.[18] The statutory obligation to cooperate with Amtrak was expressly conditioned on the railroads receiving "just and reasonable" compensation. RPSA, §402(a). Thus the provisions cited by Amtrak are in no way inconsistent with the Railroads' expectation that they were free of any responsibility for pass privileges or financial support of passenger service to the public.

Finally, Amtrak contends that honoring the Railroads' release will give them an "unintended benefit" which they could not reasonably have expected, thus excusing impairment of their contracts under *City of El Paso v. Simmons*, 379 U.S. 497 (1965). Amtrak Brf. at 37. The only "unintended benefit" relied upon by Amtrak, however, is the supposed benefit the Railroads received by reason

[18] The arrangements provided only that employees affected by the discontinuance of passenger service would continue to receive all the fringe benefits received by other employees during the protective period. Complaint, Ex. B, Appendix C-1, Art. I, Sec. 8, at R. 1.

of Congress' own action in 1972 in requiring Amtrak to provide pass privileges. Even if pass privileges to the Railroads' employees were a meaningful benefit to the Railroads themselves, those privileges are not the sort of unexpected advantage which excused impairment in the *El Paso* case. That case involved unintended benefits caused by changing economic conditions and "the evolution of a frontier society to a modern State, attended by the discovery of oil and gas deposits" (379 U.S. at 511), not purely volitional action by the State itself.[19] A government entity cannot impair its contracts at will merely by offering the other parties some supposed benefit which they have not agreed to.

Amtrak appears to concede that a contract impairment that interferes with "distinct investment-backed expectations" may not be excused. Amtrak Brf. at 39. The Railroads had just such expectations here when they elected to pay the substantial price placed by Section 401(a)(2) of the RPSA on the release offered in Section 401(a)(1). See page 21, n. 9, *supra*.

C. The Impairment Was Not Insubstantial.

The payment requirement of the 1979 and 1981 Amendments has forced the five Railroads alone to pay Amtrak more than $1 million per year. The Court of Appeals was clearly correct in concluding that the amount of the payments "precludes any contention that [the payment requirement] is merely a 'minimal' alteration of the basic agreement." Amtrak J.S. at 8a n. 6.

Amtrak asserts, without any citation of authority, that the test of the substantiality of an impairment is not its

[19] The impairment in *El Paso* was also held to be justified by public policy needs to settle land titles and promote the "efficient utilization of public lands." 379 U.S. at 516.

"absolute" amount but some kind of comparison of that amount to the total amount involved in the contract. Amtrak Brf. at 40. The Court has, however, never adopted this kind of analysis when the impairment involves the destruction of a discrete contractual right or the deprivation of a precisely quantifiable increment in contractual value. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), for example, the impairment involved the destruction of a security provision in the state's contract with bondholders. Although the record was unclear as to "how much financial loss the bondholders suffered," 431 U.S. at 19, the Court nevertheless held that the impairment was unconstitutional. In *Murray v. Charleston*, 96 U.S. 432 (1878), a reduction in interest payable on bonds was similarly held to constitute an unlawful impairment. Cases involving "takings" do not, as Amtrak asserts (Amtrak Brf. at 42), support its position because the diminution in value test applies only when it is not otherwise clear that a taking has occurred. Thus, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court held that the State's refusal to pay over interest earned on an interpleader account was a taking, even though the interest represented only a small fraction of the total value of the account. Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-438 (1982), the Court held that a government directive to install a rooftop television cable without compensation was a taking, even though the percentage diminution in value was minuscule. In each case, the State had clearly taken *all* of the incidents of some portion of a particular fund or property. Here, the United States has completely deprived the Railroads of a portion of their release from responsibility for intercity rail passenger service, and the fact of this appropriation can be determined by merely examining the bills submitted by Amtrak to the Railroads pursuant to Sec. 405(f).

Moreover, Amtrak's attempt to minimize the relative amount of the impairment is flawed. The value of the contract is properly measured by the price which was required to enter into it, which not all railroads were willing to pay (GAO Report, J.A. at 48, n.1). The additional payments compelled by the 1979 and 1981 Amendments are clearly substantial in relation to the $82.8 million paid by these Railroads to Amtrak, which Section 401(a)(2) of the RPSA provided was the sole "consideration" for the release offered by that statute.

V.

THERE IS NO NEED TO REACH THE CONSTITUTIONAL ISSUES IN THIS CASE BECAUSE THE BASIC AGREEMENT CONSTITUTES "A DIFFERENT BASIS FOR COMPENSATION" WITHIN THE MEANING OF SECTION 405(f).

This Court has repeatedly held that controversies should not be resolved on constitutional grounds if there is "some other ground upon which to dispose of the case." *Escambia County v. McMillan*, ___ U.S. ___, 104 S. Ct. 1577, 1579 (1984); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The 1979 and 1981 Amendments to §405(f) can be construed to avoid the constitutional issues presented herein.

Under the 1972 version of §405(f), the reimbursement for rail passenger privileges was limited to "such costs as may be incurred," and these costs were to be determined by the Interstate Commerce Commission, unless the railroads and Amtrak agreed on a determination of costs within a 90-day period after the enactment of the statute. Under the 1979 and 1981 Amendments, in contrast, the railroads are to pay Amtrak "at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile," unless Amtrak and the railroads

"agree on a different basis for compensation." RPSA, §405(f). Significantly, the 1979 and 1981 Amendments do not limit the period for agreement on a "different basis for compensation" to a period *after* the enactment of the 1979 Amendments, or indeed to a period *after* the 1972 Amendments. Such a limitation would require language invalidating any prior agreements; neither Amendment contains language with this effect. Thus, there is no reason why a Basic Agreement negotiated *prior to 1972* could not be considered an agreement between a Railroad and Amtrak for a "different basis for compensation." The effect of this construction would be to render the payment requirement inapplicable by its own terms to railroads which entered into Basic Agreements prior to the 1972 Amendments, because Amtrak relieved those railroads of their "entire responsibility" for such payments for the reasons stated in Parts II and III, *supra*.[30]

The 1979 and 1981 Amendments respect the principle of contract by authorizing Amtrak and the railroads to contract out of the payment requirement specified therein. There is no reason why this respect should not be extended to the contracts negotiated between the railroads and Amtrak in 1971. Construing the 1979 Amendment's reference to a "different basis for compensation" to encompass the pre-1972 Basic Agreements would avoid the constitutional issues presented by this litigation, and prevent a basic unfairness to the Railroads.

[30] As Amtrak notes, the payment requirement is also applicable to railroads which did *not* enter into a Basic Agreement. Amtrak Brf. at 21 n. 64. Thus this construction of the 1979 and 1981 Amendments leaves them with substantial effect.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed with respect to the question presented in No. 83-1492 and reversed with respect to the question presented in No. 83-1633.

Respectfully submitted,

HOWARD J. TRIENENS
GEORGE A. PLATZ*
THOMAS W. MERRILL
MARY L. BRICKER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Appellees, Cross-Appellants

Of Counsel:
RICHARD K. KNOWLTON
W. A. BRASHER
THOMAS L. SAMUEL
PAUL A. CONLEY, JR.

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* Counsel of Record

REPLY

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL RAILROAD PASSENGER CORPORATION,
Appellant, Cross-Appellee,

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
Appellees, Cross-Appellants.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR APPELLANT, CROSS-APPELLEE

Of Counsel:

WILLIAM R. PERLIK
DAVID R. JOHNSON
ANDREA TIMKO SALLET
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
JARED I. ROBERTS
Associate General Counsel
NATIONAL RAILROAD
PASSENGER CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967
Attorneys for Appellant

* Counsel of Record

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IN THE

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NATIONAL RAILROAD PASSENGER CORPORATION,
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On Appeal from the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR APPELLANT, CROSS-APPELLEE

The National Railroad Passenger Corporation ("Amtrak"), Appellant in No. 83-1492 and Cross-Appellant in No. 83-1633, hereby submits its Reply Brief in response to the Brief of the Railroads filed on December 15, 1984.

ARGUMENT

I. THE RAILROADS HAVE NOT SHOWN THAT THEY RECEIVED ANY CONTRACTUAL RIGHT TO BE RELIEVED OF THE OBLIGATION TO COMPENSATE AMTRAK FOR THEIR EMPLOYEES' PASS PRIVILEGES.

In order to establish that their right to Due Process has been violated, the Railroads must first show that they received contractual rights enforceable against the United States relieving them of all responsibility for supporting intercity rail passenger service after May 1, 1971. Their elaborate argument that they received such rights is not persuasive. Their brief fails adequately to explain, for example, how they could have expected Congress to bind itself in a statute that expressly reserved Congress' power to amend, alter, or repeal it at a later date.[1]

Even if the Railroads did receive such contractual rights,[2] they have not shown that their contract included

[1] Section 301 of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 541 (1982). The Railroads attempt to dismiss this reservation of power by characterizing it as legal boilerplate intended to preserve Congress' right to alter Amtrak's charter. Railroads' Brief at 22 n.10. Were this true, Congress would have reserved the right to make changes in "this section" or "this title," not in "this chapter"—that is, the entire RPSA. They also assert that Congress' right to repeal the statute does not imply a right to abrogate separate obligations incurred under the authority of the statute. *Id.* at 21-22. Here the only language that could plausibly be the source of the Railroads' relief is contained in the statute itself and is thus expressly subject to amendment or repeal.

[2] Both of the principal arguments advanced in Amtrak's initial brief—that reasonable payments in excess of incremental costs may lawfully be required, and that no substantial impairment of the Railroads' contract rights has occurred—represent grounds on which the 1979 Amendment may be sustained even if the Railroads did receive contract rights enforceable against the United States. Thus the Court need not reach the question whether such rights were created by either the RPSA or the Basic Agreement.

the right to be relieved of any obligation to pay for their employees' pass privileges. Quoting the statutory definition of "intercity rail passenger service" as it was originally enacted in section 102(5) of the RPSA, 45 U.S.C. § 502(5), they assert that the term was "expressly defined to include pass riders," and even suggest that Congress deliberately defined the term broadly *for the purpose* of ensuring that employee pass travel was covered. Railroads' Brief at 24. But the language they cite[3] does *not* mention pass travel and is of no relevance to the issue of financial responsibility for employee transportation benefits. They also urge that the Basic Agreement absolves them of all financial responsibility for employee pass travel, but it too fails even to mention the subject.[4]

[3] As originally enacted, 45 U.S.C. § 502(5) stated:

> "Intercity rail passenger service" means all rail passenger service other than . . . commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations . . . .

[4] The Railroads maintain that section 7.5 of the Basic Agreement —the provision declaring that Amtrak has the right to decide what level of pass privileges, if any, will be provided—creates an inference that the Railroads will have no financial responsibility whatsoever for privileges that are provided. Railroads' Brief at 25-26. There are several different reasons why the language in section 7.5 does not support their claim. First, as Amtrak pointed out in its Brief at 20 n.63, the portion of section 7.5 dealing with employee pass privileges is the only one of five separate provisions that does *not* allocate costs between Amtrak and the Railroads, thus creating the quite different inference that the parties did not form any intent with respect to this issue. Second, the statute provides a release only from "responsibilities under section I of the Interstate Commerce Act," which did not include the responsibility to provide or pay for employee pass privileges, and Amtrak and the Railroads were not empowered to expand the scope of this release by language in their contract. Third, even if the parties had agreed with respect to costs for pass travel provided at Amtrak's discretion in 1971, they surely reached no agreement concerning costs for the far broader pass privileges required by Congress to be provided after 1972.

Both courts below correctly determined that this language gave the Railroads no express contractual relief from the costs of employee pass travel. J.S. App. 4a-7a, 18a-[illegible][5]

The Railroads go on to describe employee pass travel as an "incident" of the operation of intercity passenger trains, supposedly analogous to other incidental functions such as advertising and the handling of reservations. Railroads' Brief at 24-25. Their suggestion is that passenger train operation and employee pass travel go hand-in-glove, so that their surrender of responsibility for one function logically implied giving up the other. This line of reasoning supports the view that they have no obligation to run passenger trains in order to preserve their employees' pass rights, but it says nothing about their employees' pass travel on *Amtrak's* passenger trains. The privileges created by the 1972 Amendment are not a mere "incident" or natural outgrowth of Amtrak's passenger train operations;[6] instead, they are the result of Congress' determination that the expectations of the freight railroads' employees and retirees concerning lifetime pass travel were legitimate and should be protected. The Railroads had no reason to expect that, if Congress created a statutory pass

[5] The Railroads point to various ICC cases to show that the transportation of pass riders was their "responsibility" prior to 1971. Railroads' Brief at 26-27 & n.13. These decisions merely show that the elimination of rail pass travel was one relatively minor factor to be considered when the ICC assessed the effect of train discontinuances on the nation's transportation requirements. The ICC decisions do not indicate, as the Railroads suggest, that employee pass privileges were the sort of legal responsibility Congress meant to excuse in 1971; plainly they were not a responsibility of "a common carrier of passengers by rail" under "part I of the Interstate Commerce Act or any such State or other law relating to the provision of intercity passenger service . . . ." 45 U.S.C. § 561(a)(1).

[6] Indeed, even the privileges that existed before 1971 were not mere "incidents" of the Railroads' operation of passenger trains. The record shows that "freight-only" railroads and terminal companies also provided pass privileges for their employees. J.A. 47.

privilege to enhance the morale of their freight workforce and to maintain labor peace in their industry, they would not be required to make a contribution.[7]

II. THE RAILROADS HAVE NOT EXPLAINED WHY THE REQUIREMENT THAT THEY PAY MORE THAN INCREMENTAL COSTS FOR THEIR EMPLOYEES' PASS TRAVEL VIOLATES THEIR RELEASE FROM THE OBLIGATION TO PROVIDE PASSENGER SERVICE.

Amtrak has shown that the requirement that the Railroads pay more than incremental costs for their employees' pass travel is constitutional, since the Railroads can invoke neither a general right to pay only incremental costs for services provided at government direction, nor a particular right to that effect grounded in the RPSA or the Basic Agreement. The Railroads respond by insisting that they do have rights and obligations different from those of the general public.[8] They

[7] The Railroads attempt to meet this point by contending that their release from all passenger service responsibilities included relief from all statutory obligations that might be imposed in the *future*, not just from those that existed in 1971. Railroads' Brief at 27. The notion that Congress bound itself so completely is inconsistent not only with the "amend, alter or repeal" language of section 301, but also with the experimental character of Amtrak and the RPSA. Elsewhere, in an equally inventive statutory construction, they assert that the language in the 1979 Amendment allowing Amtrak and the Railroads to "agree" on a basis for compensation other than the 25%-of-yield standard should be read to comprehend not just future agreements, but also the parties' alleged agreement in 1971 that there would be no compensation due Amtrak for Railroad employees' pass travel (as if the 1979 Amendment said "unless *they already agreed*" on a different basis for compensation"). *Id.* at 41-42. It is sufficient to say that in both cases the Railroads have devised creative but unpersuasive statutory interpretations that badly distort the evident intent of Congress.

[8] The Railroads take this position because they have difficulty showing that the right to pay only incremental costs is one shared by the general public. Were that the case, the fixed costs of services

assert that even if the statute does not excuse them from paying *any* costs of employee pass travel, Congress has "plainly circumscribed" its power to impose charges in excess of incremental costs. Railroads' Brief at 33.

The Railroads' argument consists of nothing more than this unsupported assertion—a bold *ipse dixit*. Nowhere do they explain why the general release from responsibility to operate passenger trains carries with it a special limitation on the amount they can be required to pay for their employees' fringe benefits.[9] They bear the burden of showing that fees higher than incremental costs are proscribed, and they have not met that burden.

The Railroads assert that even if the Basic Agreement leaves them on the same footing as the general public with respect to obligations for employee fringe benefits, they still cannot be required to pay more than the incremental cost of those benefits. Railroads' Brief at 33-34. They maintain that the Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), supports this view. But the *Webb's* decision, which was expressly limited to "the narrow circumstances of [that] case," *id.* at 164, at most stands for the proposition that the Railroads cannot be required to pay twice for the service they and their employees receive—and indeed, under section 405(f) they pay only once. The fact that

provided at government direction could not be recovered, and Congress would be unable to pursue the policy of self-sufficiency reflected, for example, in the Independent Offices Appropriation Act, 31 U.S.C. § 9701 (1982). *See* Amtrak's Brief at 21-27.

[9] The closest the Railroads come to an explanation is the assertion that their general release "must be read to mean at the very least that the Railroads cannot be compelled by statute to pay any of the costs which are necessary to provide intercity rail passenger service to the general public and which would be incurred in the absence of any pass privileges." Railroads' Brief at 32. This formulation presupposes that they have a right to pay only incremental costs, and thus begs the central question: what is the source of that right?

the Railroads as well as their employees help defray the cost of pass travel is not a constitutional problem—particularly where, as in this case, the combined payments do not begin to cover the full costs of the service.[10]

The Railroads acknowledge that if the alleged contract is construed narrowly to exclude relief from payments for pass privileges, then they may be required to compensate Amtrak for the cost of those privileges. But they erroneously insist on interpreting "cost" to mean "incremental cost," as if no other possibilities existed. The concept of cost is broader than they admit, and includes, for example, fully allocated costs as well. Congress itself plainly used the term "cost" in this broader sense.[11]

On the facts of this case, compensation based on fully allocated costs might be more difficult to defend. But the fact is, Congress did not settle on a compensation scheme based on fully allocated costs. Instead, Congress appears to have taken the very high "full costs" of operating rail passenger service into account, along with numerous other factors, such as Amtrak's receipt of many half fares, the space-available limitation, and the shifting of

[10] The record shows that in 1979, Amtrak was recovering slightly more than one-third of its full costs from revenues, and the balance was funded through federal subsidies. J.A. 62-63, 100.

[11] The Railroads assert that Congress gave GAO the "internally inconsistent direction" to determine appropriate "cost" reimbursement by taking into account the "value" of the pass privilege. Railroads' Brief at 30. The statute might be internally inconsistent if "cost" signified only "incremental costs," and for that very reason the Railroads should assume that Congress used the term in its less restrictive sense. Congress knew when it enacted this language that its 25% formula was higher than incremental cost, and that GAO's analysis based on value was likely to be higher as well. *See id.* It also knew that the full cost of Amtrak travel was more than ten times the amount of the statutorily required reimbursement (that is, the reimbursement was one-quarter of the price of a ticket, which in turn was approximately one-third of Amtrak's full cost).

all liability costs to Amtrak. On the basis of all these considerations, Congress discounted the Railroads' obligation substantially from the normal marketplace "value" of Amtrak travel, requiring the Railroads to pay only one quarter of the cost of a ticket for their employees' pass travel.

The Railroads do not dispute that Congress had these factors in mind; instead, they challenge the statute on the ground that its 25%-of-yield approach is not based on a precise determination of cost actually imposed.[12] They misconceive the limits of Congress' discretion in drafting legislation to address social and economic matters. There is no constitutional requirement that Congress undertake such precise quantification—it surely can deal with averages and approximations in determining the appropriate basis for spreading the costs of pass travel.[13]

The Railroads assert that "value" is not an appropriate issue for Congress to consider in fixing compensation for pass privileges. Railroads' Brief at 33-34, 39. Their argument overlooks the fact that, for their Due Process claim to succeed, they must at a minimum show that they were rendered worse off as a result of enactment of the 1972 and 1979 Amendments.[14] They cannot make such a

[12] The Railroads complain that Congress has not "quantified" the revenues Amtrak loses when persons who would otherwise choose to pay full fare are permitted to travel free or at reduced rates; and they protest that the legislative record does not show the costs Amtrak must bear as a result of Congress' assignment to it of all liability arising out of Railroad employees' pass travel. Railroads' Brief at 29 n.14.

[13] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976); *see also* cases cited in Amtrak's Brief at 22-23.

[14] *See, e.g., Local Division 589, Amalgamated Transit Union v. Commonwealth of Massachusetts*, 666 F.2d 618, 639 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982); *cf. Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665, 668-669 (7th Cir. 1982).

showing when Congress bestows a benefit on them and then requires them to make a reasonable payment for it. The 1972 Amendment plainly conferred a benefit on the Railroads, and the value of that benefit was an express and appropriate factor in Congress' decision to increase their compensation obligation in 1979.

The Railroads also claim that Congress has acted irrationally in applying the same compensation formula for on- and off-line pass travel, without taking into account Amtrak's receipt of half-fares for off-line trips. Railroads' Brief at 34. They ignore the fact that the difference between the two types of transportation is not as clear or important from the perspective of the Railroads as it may be from the perspective of individual pass riders.[15]

In sum, the Railroads cannot support their claim that they have some special contractual right to pay only incremental costs for their employees' fringe benefits. Congress acted rationally in considering the issues of cost and value that led to the 25%-of-yield formula, and it was not constitutionally required to undertake any more precise economic analysis.

III. THE RAILROADS HAVE NOT SHOWN ANY SUBSTANTIAL IMPAIRMENT OF CONTRACTUAL RIGHTS.

The Court's contract impairment decisions plainly establish that "substantiality" is a threshold inquiry, and that impairments that are not substantial raise no constitutional issue. *E.g., Energy Reserves Group, Inc. v.*

[15] While Congress has chosen a reasonable approach by tying the Railroads' compensation obligation to actual usage of pass privileges by their employees, even this approach is not constitutionally compelled. The Railroads benefit, and have done so since 1972, just by virtue of inclusion of the statutory pass privilege in their employees' compensation packages. Thus the Railroads get a direct economic benefit, as well as improved morale, even though some employees may choose not to take full advantage of the privilege.

Kansas Power & Light Co., 459 U.S. 400, 411, 413 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). The Railroads attempt to dismiss the substantiality test on two grounds. First, they argue that it is not a relevant issue where a "discrete contractual right" has been destroyed or a "precisely quantifiable increment in contractual value" has been taken. Railroads' Brief at 40. Second, they assert that payments exceeding one million dollars a year cannot be deemed an insubstantial impairment of a bargain for which they paid some $82.8 million in 1971. *Id.* at 39, 41. The Railroads mischaracterize both what they have lost and what they gained in the first place.

Given the Railroads' inability to point to any language in the RPSA or the Basic Agreement promising them relief from the costs of employee pass travel, their claim that they have lost a "discrete contractual right" is not credible.[16] Even if such a right did exist, it was certainly not a distinct and separable element of the arrangement they entered in 1971. As for quantifying the economic significance of abrogating such a right, the matter is far more complex than the Railroads suggest. They indicate that the impairment can be assessed "by merely examining the bills submitted by Amtrak to the Railroads pursuant to Sec. 405(f)." Railroads' Brief at 40. But the Railroads' loss must be offset against their gain: a valued fringe benefit for their employees, the existence of which eased labor tensions in the early 1970's, and for which the Railroads paid virtually nothing from 1972 to 1979. It is by no means clear that the Railroads suffered any net loss as a result of enactment of the 1972 and 1979 Amendments. If they did, and if a court could

[16] The Railroads' course of conduct from 1972 to 1979 indicates that they did not believe any contract impairment had occurred. Although they were required to pay hundreds of thousands of dollars for their employees' pass travel, under a statutory requirement which they now contend was plainly unconstitutional, they took no action whatsoever to challenge the requirement.

somehow quantify the loss, it would surely not be substantial.[17]

Having overstated their loss, the Railroads proceed to understate substantially the value of the release from passenger service obligations. The $82.8 million in start-up payments represent what they surrendered, not what they received. By paying those sums—one-half of one year's passenger service deficits—they avoided far greater losses in subsequent years.[18] The Railroads have been free of all passenger service losses for over thirteen years, and the losses they avoided far outstrip the amounts of the start-up payments. It is against this far larger measure of the value of the release that the magnitude of the alleged impairment must be judged. Again, if *any* net impairment did occur, taking into account benefit to the Railroads, it was plainly not a substantial impairment of the overall value of the release.

Amtrak noted in its initial brief that under the reasoning of the Court's decision in *City of El Paso v. Simmons*, 379 U.S. 497 (1965), subsequent legislative efforts to deal with unforeseen benefits in contractual relationships

[17] The Railroads attempt to question the importance of pass privileges to the railroads who employ the pass riders, suggesting that unique circumstances may have led the Penn Central and the Norfolk & Western to press Amtrak for continuation and expansion of pass travel. Railroads' Brief at 6 n.3, 39. But the record shows that "*the railroads*, and particularly Penn Central, had expressed the view that the withdrawal of free transportation privileges of employees threatened to produce severe problems *for the railroads* which, it was felt, would end by being harmful to Amtrak." J.A. 83 (emphasis added).

[18] Section 404 of the RPSA, 45 U.S.C. § 564, which was signed into law six months before the May 1, 1971 transfer date, stated that railroads that chose not to transfer service would be barred from discontinuing passenger service prior to January 1, 1975. Even after that date discontinuance could be effected only with the approval of the ICC. Thus it is reasonable to assume that at least four years' additional losses would have been incurred.

should not be deemed to cause substantial impairment. The Railroads attempt to dismiss this principle on the ground that the unintended benefits in the *El Paso* case arose from unforeseen economic conditions, whereas here they arise through a "purely volitional action by the State itself." Railroads' Brief at 38-39. But Congress did not create the statutory pass privilege in 1972 on a whim. Instead, it undertook what then appeared to be necessary regulation of interstate commerce, in order to preserve labor peace in the rail industry and to protect the legitimate interests of railroad employees.[19] It was employees' expectations engendered by the Railroads themselves, not simply the "volition" of Congress, that led to amendment of the statutory scheme to require Amtrak to provide pass privileges. Requiring the Railroads to pay reasonable amounts for those benefits does not constitute substantial impairment of the original bargain.[20]

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[19] Amtrak's Brief at 8-11. The legislative history of the 1972 Amendment, cited in Amtrak's Brief at 11, shows that Congress had in mind the same purpose that led to enactment of the Employment Retirement Income Security Act: ensuring that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it." *Pension Benefit Guaranty Corp. v. Gray & Co.*, 104 S.Ct. 2709, 2713 (1984), *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). *See, e.g.*, 118 Cong. Rec. 14,790 (1972), where Senator Cooper stated in debates on the 1972 Amendment that railroad employees regarded lifetime passes upon retirement as "a part of their compensation, and a vested retirement benefit."

[20] In response to Amtrak's assertion that Congress could also take into account the dilution of Amtrak's revenues caused by creation of the pass privileges, Amtrak's Brief at 27 n.82, the Railroads argue that it is not reasonable to assume that substantial numbers of pass riders would choose to travel on Amtrak in the absence of free or reduced-rate privileges, since less than one percent of the traveling public opts to take Amtrak. Their statistical comparison is misleading, since railroad employees as a group are undoubtedly more favorably disposed to train travel than the public at large, and since pass riders are by definition persons who have already found train travel to be convenient and desirable. The real question to be

IV. THE RAILROADS ERR IN ARGUING FOR REVIEW ACCORDING TO THE "NECESSITY" TEST OF *U.S. TRUST*.

The Railroads maintain that Congress has impaired its own contractual obligation and that the strict "necessity" standard of review applied in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), should therefore be applied to this case. They offer two reasons for invoking the "necessity" test: first, the government can function effectively only if it is held to its promises; and second, the government's self-interest is at stake when it impairs its own contractual obligations, so that it cannot be presumed to function in a disinterested manner. Railroads' Brief at 15-16.

Even if the Congress had failed to keep a promise in this case, there would still be no justification for applying the strict "necessity" test of *U.S. Trust*. The argument that strict review is warranted whenever the government stands to benefit from legislative action proves far too much. Strict review cannot be required every time there is a possibility of government benefit, for federal expenditures are almost always affected, directly or incidentally, when Congress enacts legislation.[21] Surely

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posed is, how many persons currently riding on trains under some pass privilege would be driven away if the discount were discontinued? Viewed in this light, the possibility of dilution acknowledged by GAO, J.A. 65, 68, is not as remote as the Railroads contend.

[21] The Court's recent decision in *Gray* confirms that the mere fact that legislation may serve the government's economic interest does not by itself justify the invocation of strict scrutiny. The legislation challenged and eventually upheld in *Gray*—the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* (1982)—was passed for the express purpose of imposing retroactive financial obligations on private employers in order to diminish the likelihood that numerous private pension plans would terminate, thus forcing the Pension Benefit Guaranty Corporation—an entity wholly owned by the United States—to assume obligations in excess of its capacity. Although preexisting private

not all enactments with such an impact are valid only to the extent they are "necessary" to accomplish a legislative purpose.[22]

In fact, legislation is reviewed under a strict "necessity" test only when it impairs a limited category of government obligations—those that involve a clear contractual commitment by the government to repay money borrowed from private parties or to take other actions directly related to financial transactions. The Railroads implicitly concede the limited role of the stricter standard of review, for they seek to justify its invocation on the ground that "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." Railroads' Brief at 15, citing *Lynch v. United States*, 292 U.S. 571, 580 (1934).

The other authorities upon which the Railroads rely are, like *Lynch*, cases denying legislatures the power, absent some compelling purpose, to impair their own

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contractual arrangements were disrupted by enactment of the MPPAA, and although it was aimed at preserving the financial viability of a government corporation, the Court upheld the statute on the ground that Congress had acted rationally. The Court expressly declined to apply a stricter standard of review. 104 S.Ct. at 2719-20.

[22] The implications of employing the strict "necessity" test whenever the government's self-interest is at stake are staggering. In each such case the question would be asked, could Congress or a State legislature have accomplished its purpose by any other means? The Railroads' suggestion that Congress should have paid for employe pass privileges if it thought they were important, Railroads' Brief at 36, highlights the most obvious pitfall of the strict test: in many, if not most cases involving legislation that adjusts economic burdens, Congress could achieve its purpose by appropriating additional federal funds rather than requiring private parties to bear part of the burden. Congress' well-recognized discretion to adopt the most appropriate means to deal with economic or social problems would be seriously eroded under such a test. *See, e.g., Turner Elkhorn*, 428 U.S. at 15-19.

contracts where the government's credit has been pledged. *See Perry v. United States*, 294 U.S. 330, 351 (1935) (describing the government's pledge of its credit as "the highest assurance the government can give" and denying Congress the power "to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers"); *U.S. Trust*, 431 U.S. at 24-25 (stating that "States are bound by their debt contracts" and explaining that while not every security provision of a bond agreement is necessarily "financial," a commitment to safeguard the revenues securing bonds is indeed "financial" and thus binding on the State); *Energy Reserves Group, Inc.*, 459 U.S. at 412 n.14 ("In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets").[23]

The strict standard of review that is employed in these cases is clearly limited to situations involving governmental debt contracts or similar financial obligations.[24]

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[23] *See also Local Division 589*, 666 F.2d at 642 (emphasizing that "*United States Trust* limits its stricter 'review' approach to state laws in the 'financial' area," and stating that the facts of that case "presented a paradigm of the type of protection that the Contract Clause was designed to offer—a protection given to those who invested money, time and effort against loss of their investment through explicit repudiation").

The Railroads seek support for broad application of a strict standard from the commentators, but there too arguments for strict review are generally restricted to narrow circumstances easily distinguished from the ones in this case. Professor Tribe's view that absent compelling circumstances, "government must keep its word," Railroads' Brief at 16, is limited to situations where the government chooses "to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned." L. Tribe, *American Constitutional Law* 470 (1978). In this case, the government has used language indicating regulatory relief rather than binding contractual obligation, and it has cautioned against reliance by expressly reserving its right to amend or repeal the RPSA.

[24] This approach is not in conflict the important principle that the government cannot bargain away essential attributes of its sover-

The Railroads seek to justify strict review here by suggesting that the release Congress gave them is "akin to a government financial obligation or tax exemption contract . . . ." Railroads' Brief at 21. But the analogy does not work.[25] The Congress has not struck a financial bar-

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eignty, for as the Court has noted with respect to State and city governments, "when they borrow money and contract to repay it with interest, they are not acting as sovereignties. They come down to the level of ordinary individuals." *U.S. Trust*, 431 U.S. at 25 n.23, *quoting Murray v. Charleston*, 96 U.S. 432, 445 (1877).

Another reason for treating government impairment of financial obligations differently is that when the government enters into a contract to borrow money and repay it at a prescribed rate, it has induced a private party to forego a broad range of other investment opportunities, based on the particular economics of the transaction and perhaps on the superior reliability of the government as well. The Railroads' release from passenger service obligations arose in an altogether different context. They were not choosing among alternative investments; instead, they were paying to be relieved of their common carrier obligation to operate passenger service.

[25] That the Railroads recognize the weakness in the analogy is demonstrated not just by the slight attention they pay this point, but also by their deliberate omission of language from the *Perry* decision showing the limited reach of that case. At page 14 of their brief, they include an extensive quote from *Perry* stating that there is

> a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of Congress to alter or repudiate the substance of its own engagements . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise.

The language they have chosen to delete shows the limited scope of the *Perry* decision. The Court was speaking only of

> the power of Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money "*on the credit of the United States*," the Congress is authorized to pledge that credit as an assurance of payment as stipulated, as the highest assurance the Government can give, its plighted faith.

294 U.S. at 351 (emphasis in original). *See also id.* at 353. When this omitted language is considered, the *Perry* decision is shown to be consistent with other authorities limiting strict enforcement of governmental commitments to financial contracts wholly different from the release at issue in this case.

gain with the Railroads or pledged its credit in any respect; it has simply offered them relief from valid and longstanding regulatory burdens placed on common carriers. The fact that Congress conditioned relief on the payment of money to enable Amtrak to commence operations does not convert the RPSA or the Basic Agreement into financial instruments. Here Congress is exercising its sovereign power as regulator, and does not confront the Railroads as a mere obligor. The Railroads can point to no judicial authority employing a strict "necessity" test in this non-financial context.[26]

The Railroads attempt to buttress their plea for strict scrutiny by alleging that Congress' self-interest is at work here in some unseemly way. Railroads' Brief at 30-31. Again, the record does not bear them out. The best explanation of the origin of the 1979 Amendment comes from its sponsor, Congressman Florio, who stated in hearings that it was "difficult to accept railroad employees riding for virtually free, . . . if, in fact, the taxpayers are paying $2 for every $1 of the general passenger public." J.A. 100. The goal, in other words, was to spread the costs of pass riders' transportation more equitably, so that these costs would no longer be

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[26] That strict review is not appropriate where the government impairs its own non-financial contracts is confirmed by the decision in *El Paso*, where the government itself was a party to the land contracts that were arguably impaired. *Cf. United States v. Perhomnik*, 182 F.2d 829 (2d Cir.), *cert. denied*, 340 U.S. 825 (1950).

borne entirely by the general public, but would be funded in some more meaningful measure by the employing railroads. Both purposes—compelling the Railroads to pay a greater share, and reducing the need for federal support paid by all taxpayers—are legitimate legislative goals.[27]

In sum, the Railroads have not shown that the 1979 Amendment should be judged by any test more restrictive than the familiar means-ends test of rationality, nor have they cast any doubt on the reasonableness of Congress' action.

CONCLUSION

For the reasons set forth above, the Court of Appeals' holding that the 1979 Amendment is unenforceable should be reversed.

Respectfully submitted,

Of Counsel:

WILLIAM R. PERLIK
DAVID R. JOHNSON
ANDREA TIMKO SALLET
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

PAUL F. MICKEY, JR.*
Executive Vice President—
Law and Public Affairs
JARED I. ROBERTS
Associate General Counsel
NATIONAL RAILROAD
PASSENGER CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3967
Attorneys for Appellant

* Counsel of Record

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[27] The Railroads assume that reducing federal subsidies is not a proper concern, and they see it reflected in the language of Senate Report No. 96-183, stating that an early version of the 1979 reimbursement requirement "reflects revenue considerations rather than cost considerations." Railroads' Brief at 30. But they do not acknowledge that the provision referred to in this Report was not adopted and that it required compensation at a *50%* rate, not the 25% rate that was ultimately enacted. Congress reconsidered and lowered the rate; and two years later, following receipt of GAO's extensive analysis of cost and value considerations, it made the 25% formula permanent.